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# Supreme Court of the United States

OCTOBER TERM—1949

No. 576

L. N. JACKSON & Co., INC.,
Petitioner,

*against*

THE ROYAL NORWEGIAN GOVERNMENT,
Respondent.

## PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

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# Supreme Court of the United States

OCTOBER TERM—1949

No. .

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Petitioner,

*against*

THE ROYAL NORWEGIAN GOVERNMENT,

Respondent.

## PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

L. N. Jackson & Co., Inc. (a New York corporation), hereby respectfully petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to certify to this Court, for review and determination, its proceedings and final judgment, rendered on November 10, 1949 (with the dissent of Chief Judge Learned Hand), reversing a $91,384.52 judgment in plaintiff's favor against the Royal Norwegian Government and directing the dismissal of the complaint.

The judgment so reversed had been rendered by the United States District Court for the Southern District of New York on March 3, 1949 after trial before Goddard, J., without a jury (R. 340-1).

A timely petition for rehearing was filed on November 23, 1949, and was denied on November 29, 1949 (R. 364-385).

This action was commenced in the referred to United States District Court on November 27, 1946, by the filing of the complaint and issuance of summons (R. 2-8). Those were served on November 29, 1946 (R. 1). Issue was joined on April 29, 1947 (id). The action was tried before the Hon. Henry W. Goddard, without a jury, on December 27-29, 1948 (id). An opinion was rendered on February 9, 1949. Findings and conclusions were signed on March 2, 1949. Judgment followed on March 3, 1949 for damages in the sum of $64,190.00 plus interest of $27,096.95 plus costs of $94.56, making in all $91,384.51.

The Royal Norwegian Government duly appealed to the United States Court of Appeals for the Second Circuit. That Court (composed of Judges Learned Hand, Thomas W. Swan and Charles E. Clark), rendered its opinion, decision and judgment, as noted above, on November 10, 1949, Chief Judge Hand, dissenting.

After the denial of a petition for rehearing, the Court of Appeals issued its mandate on November 30, 1949. Judgment in accordance therewith was entered in the District Court on December 9, 1949.

## The Opinions Below

The opinion of the trial court appears at pages 326-335 of the record and is reported in 83 F. Sup. 486.

The reversing opinion of Clark, C. J., concurred in by Swan, C. J., and the dissenting opinion of Learned Hand, C. J., are reported in 177 F. 2d 694 and appear at pages 347-362 of the Record.

Digests of the opinions appear at pages 6-12, *infra*.

## The Matter Involved

The matter involved is the exoneration of a promisor from the payment of damages caused by his total non-performance of an unqualified commercial contract—where such non-performance is claimed to have arisen from, or been due to, compliance by the promisor (who owed no allegiance and was not subject to the laws of the United States) with an earlier voluntary and at-will contract with the United States.

The exculpating decision by the majority of the Court of Appeals appears to be an unprecedented departure from all prior decisions on the point.

Performance in this case cannot be said, and has not been said, to have been rendered impossible by the destruction or governmental requisition of the *res* or of the means of performance nor by a supervening contingency beyond the promisor's control nor by the intervention of superior power or force; nor was performance prohibited by law or any act having the force of law.

Thus none of the hitherto recognized grounds of exculpation applied.

Acknowledging that, the opinion of the reversing two Circuit Judges rested their decision on a liberal application of a philosophy, quoted from Professor Dodd's "Impossibility of Performance of Contracts Due to War-Time Regulations", 32 Harv. L. Rev. 789, 791, that "Courts are free to regard the problems arising out of governmental interference in war-time as to a large degree *sui generis*, and that they need not adhere strictly in cases of this sort to the precedents which have been established in the law of impossibility of performance in general, but are at liberty to reach the results most consistent with justice and public policy, as long as these results can be obtained with due regard to the more fundamental principles of the law of contracts" (R. 351).

**A Summary Statement of the Facts**

On November 7, 1941, in New York, *by a contract in writing* (Plf's. Ex. 1, R. 239-240, admitted at R. 62-3) *which expressed no qualifications or reservation,* The Royal Norwegian Government (acting through a domestic berth agent) undertook to transport to the plaintiff in New York from Beira in Africa 1,000 tons of copra, at $22.00 per ton, by a vessel named the "Tropic Star".

The vessel was "owned, operated, controlled and managed" by The Royal Norwegian Government and flew the Norwegian flag (finding 3, R. 336). It was then in Africa (finding 7, R. 337). It had not been here for a year, if at all (R. 113).

After consented to delay in the commencement of the voyage and while the copra was awaiting loading, "defendant notified the plaintiff on December 23, 1941 that pursuant to the orders of the United States Maritime Commission, plaintiff's shipment of copra * * * was cancelled" (finding 8, R. 337).

The referred to "orders" were a telegram from an assistant director (one of a number) of the United States Maritime Commission to the berth agent in New York: "Tropic Star due to requirements for critical strategic commodities please cancel booking 1,000 tons of copra, substitute sisal wool. Confirm" (Defendant's Exhibit E, R. 279, admitted R. 133). The substance of this was reiterated by the same assistant director in a telegram on January 2, 1942 (Defendant's Exhibit G, R. 280, admitted R. 135).

Thereafter, defendant refused and failed to load and carry plaintiff's copra. In place thereof, it carried 1,000 tons of wool, at $56.00 per ton (R. 220, 234). Thus nonperformance of the contract with the plaintiff resulted in a profit to the defendant of $34,000.

Wool and copra had precisely the same O. P. M. strategic rating of C (R. 295), and according to O. P. M.'s official certification, there was no O. P. M. directive for priority

of one over the other (R. 293-4). It was the O. P. M. which determined and certified to the Maritime Commission the relative strategic needs (R. 139, 144-52, 175-9, 215-216, 218).

The assistant director of the United States Maritime Commission who had sent the telegrams testified that he did so on his own initiative, without consulting, or reporting to, any of his superiors or the legal department; he consulted neither as to the policy nor authority to direct or request a breach of an unqualified contract, which, as here, had been entered into after consultation with, and approval by, the Commission (R. 159-160, 205-9). His immediate superior testified that he had not been consulted, nor informed, and that the matter of ordering ship owners to cancel shipping contracts had never been taken up by him or the Commission (R. 139, 144-7). The matter was not covered by any instructions or regulations (R. 147, 207). A request or directive to cancel a specific contract was without precedent (R. 190).

A month before contracting with the plaintiff—on October 4, 1941—"defendant voluntarily filed" with the United States Maritime Commission, an "Undertaking for Merchant Ship Warrants" under the Ship Warrants Act of July 14, 1941 (55 Stat. 591, U. S. C. Title 50, Appendix Sec. 1281, et seq.). The "undertaking" was "in respect to the vessels described in Schedules A and B attached hereto". The "Tropic Star" was not included in any schedule filed prior to April, 1942. (Finding 5, R. 536; Defendant's Exhibits B, C, J, R. 259-278, 283-4, admitted R. 85, 95, 136). The trial court, however, found that the "Undertaking" which the defendant "voluntarily filed" on October 4, 1941 was "for all its ships which would or might come to United States ports" (Finding 5, R. 336).

The "Undertaking" specified no period of duration. Its at-will character (*Rubin* v. *Dairymen's League Co-Op. Assn., Inc.*, 284 N. Y. 32) was emphasized by provisions that ship warrants were surrenderable at the will of the

holder and revocable at the will of the Commission (R. 261).

After the filing of the "Undertaking" as before, and including November and December, 1941, and January, 1942, according to the uncontradicted testimony of the representatives of the defendant as witnesses for the defendant, defendant at all times dealt with the United States Maritime Commission *not* on a basis of *command and obedience* but on the basis of *mutual consultation and mutual agreement;* there never was a taking of orders (R. 69-70, 74-76, 109-112, quoted in the Appendix, pp. 48-54, *infra*).

"The facts found by the [trial] court", the defendant said in its brief to the Court of Appeals, "are, generally speaking, deemed correct with the exception of finding No. 10 (F. 1011) which a conclusion of law." The referred to finding 10 is: "This intervention of the United States Maritime Commission was an event which was foreseeable by the defendant at the time it entered its contract with the plaintiff and was a condition that could and should have been provided for in the said contract" (R. 337).

**The Ratio Decidendi of the District Court**

The District Court held that defendant's contract with the United States Maritime Commission having been entered into—voluntarily—on October 4, 1941, the defendant, at the time of contracting with the plaintiff on November 7, 1941, "knew or should have known" that the latter was "subject to the conditions and potential limitations of the Ship Warrants Act" and if defendant expected to be excused from performing in the event of a conflict with its obligations under the earlier contract with the Maritime Commission, a condition to that effect "could and should have been provided * * * in the contract with the plaintiff" (findings 9-10, R. 337). "* * * the defendant cannot claim that the orders of the Maritime Commission were not foreseeable" even though it be assumed that it "did not expect the outbreak of war nor anticipate that the Maritime

Commission would exercise the rights granted under the Ship Warrants Act" (opinion, at R. 333).

The District Court held further (R. 333-4):

> "To establish the defense of frustration it must appear that the one asserting it had not been instrumental in bringing about the intervening event either by positive action or acquiescence, and the act of government which is alleged to have frustrated the performance of the contract must be one in its sovereign capacity, a *vis major* or in the nature of a *vis major.* * * *
>
> "Where one voluntarily by contract places ships under government order, the doctrine of frustration does not apply. * * * It further appears that the act of the Maritime Commission in requesting the cancellation of the booking of plaintiff's copra was not an exercise of *vis major,* but merely the exercise of a contractual right granted to it by the defendant. Baker Castor Oil Co. v. Insurance Company of North America, 157 F. (2nd) 3 (C. C. A. 2)."

**The Grounds of the Reversal**

In reversing the judgment of the District Court, Judges Clark and Swan, in an opinion written by the former, held, in substance, as already indicated, that the doctrine of the inexorableness of the obligation to perform a contract, except as expressly or impliedly qualified by the terms of the contract itself, has been undergoing a process of progressive relaxation and that it was time to pronounce the rule to be that non-performance is excused when, in "fairness and justice", a party should not be held to his contract. They held further that in this case it was unfair and unjust to hold The Royal Norwegian Government in damages for its non-performance because it seemed to them [without proof] that the Norwegian Government acted under "governmental coercion" by the United States and, further, in laudable cooperation "with

the war effort" in which the two governments were jointly engaged as allies.

In this connection, the opinion of Judge Clark states:

> "Here the parties, the court below, and the state court have framed the issue in terms of the 'frustration' of a contract; but that, as Professor Corbin has said, may be 'only perpetuating the use of a bad term to state the result.' Corbin, Frustration of Contract in the United States of America, 29 J. Comp. Leg. & Int. L., Pts. III and IV, pp. 1, 7 * * * And since the parties may have stipulated as to, or at least had in mind, the very occurrence, the issue becomes one as to the fairness and justice of excusing performance in the light of the circumstances affecting the parties at the time they made their contract. [R. 352]
>
> "* * * To us the overriding power of the American government seems so clear. * * * [R. 352-3]
>
> "Finally the assertion that defendant, as a sovereign power, was not bound to obey the commands of an ally overlooks the realities of defendant's position, as well as the terms of its own commitment. This was a year and a half after the German invasion of Norway. Defendant was then a government in exile. Neither then nor later did it give sign of lack of loyalty to the allied cause; and it was one of the twenty-six countries which on January 2, 1942, subscribed to the 'Declaration by the United Nations,' as a pledge to pursue a common purpose against a common foe and to co-operate with each other in their common struggle. It was not likely, therefore, that it would join with the three countries of known Fascist sympathies—Argentina, Portugal, Spain—against the vast body of the world's neutral merchant marine, in refusing to accept the Ship Warrants system. Had it done so, the President's power to requisition foreign merchant vessels in American waters had already been granted by the Act of June 6, 1941, c. 174, 55 Stat. 242, 50 U. S. C. A. App. § 1271, and was available for

as effective use here[1] as was its operation against, for example, the Danish vessels. * * * And the reality of the coercion upon the defendant to carry the wool, instead of the copra, is not subject to doubt upon this record."[2] [R. 353-4]

Turning "to the controlling question that the defendant's promise was so without exception in law, that notwithstanding the governmental coercion, it must pay the plaintiff's lost profits on the transaction" (R. 354), Judge Clark stated that the District Court's "approach practically puts the burden upon the promisor to show nonforeseeability" of the interfering contingency (R. 355). That was "too heavy a burden upon the defendant" (R. 355). It "passes belief" that the plaintiff did not know on November 7, 1941 that defendant's vessels had been placed under the Ship Warrants Act—although no evidence was presented by either party of such knowledge by the plaintiff or its shipping brokers (R. 356). "Plaintiff should have known of the existence and operation of the system substantially as fully as the defendant. * * * Defendant could reasonably have so concluded, and hence * * * there was no arbitrary[3] obligation on the defendant to protect itself by express stipulation against the operation of the system" (R. 356).

"After all, we need not consider what would have been the legal effect of a direction from the Maritime Commission for the substitution of a cargo in the place of the one contracted for had it been given before

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[1] This argument overlooks (a) the realities of international intercourse and (b) also the fact that the statute applied only to merchant vessels "lying *idle* in the waters *within the jurisdiction of the United States*". Most of defendant's vessels, including the Tropic Star, were not in the United States (R. 96, 99, 112).

[2] The record contains not an iota of evidence of such coercion; directly to the contrary is the testimony of only defendant's own witness (see appendix, *infra*, pp. 48-54).

[3] Why call it "arbitrary"?

December 7. That did not happen. It is clear that the Maritime Commission, which originally suggested the availability of the 'Tropic Star' to Seas Shipping for this voyage, expected the arrangement to be carried out, as did all the other parties at the time it was initiated. Actually it was the Pearl Harbor calamity, the resulting wars over the world, and the immediate shipping crisis which furnished the real occasion for the chain of events precipitating this case. To say that this, the greatest naval disaster in our history, was unexpected is of course an understatement." [R. 357]

• • • •

"Finally we turn to an important enunciation of public policy in situations of this sort as made by Congress in the Act of May 31, 1941, 55 Stat. 236, amending the prior act of June 28, 1940, and now set forth in 50 U. S. C. A. App. § 1152(a)(7). This act authorized the President to assign priorities on delivery of materials and then provided: 'No person, firm or corporation shall be held liable for damages or penalties for any default under any contract or order which shall result directly or indirectly from his compliance with any rule, regulation, or order issued under this section.' (Later it was amended to add that this should be so, even though the rule, regulation, or order should thereafter be declared invalid.) Since the Commission's order was a step to carry out the priority requirements as established by the Office of Production Management, there is ground for asserting that this statute is directly applicable to the circumstances of this case. Pedrick and Springfield, supra, at 719; cf. Nash v. Southern Pac. Co., D. C. N. D. Cal., 260 F. 280, 284. But we need not go that far here in view of the basis we find in the common law for our conclusion. At the very least the Act, particularly against the background of its legislative history, is ample demonstration of the legislative view that per-

sons co-operating with the war effort should not be held liable for civil damages because of their acts. Frey, supra at 169. It thus re-enforces and supports the common-law principle." [R. 359-360]

*That disposition of the case, petitioner verily believes, ignores the facts as found by the trial court despite defendant's concession of the correctness thereof, ignores "the issue" as "framed" by the parties and tried and decided by the District Court* (see Judge Clark's opinion at R. 352) *and postulates facts which have no basis in the evidence and are contrary to the evidence, and lays down rules of law contrary to those which heretofore have prevailed.*

**Judge Learned Hand's Dissent**

In dissenting, Chief Judge Learned Hand noted the absence of evidence that at the time of contracting the plaintiff knew "that the defendant had already consented to take out warrants under the [Ship Warrants] Act" (R. 361-2). "For this reason," he continued (R. 361-2),

> "in the case at bar the defendant's excuse is to be judged as though it had not in fact consented to take out warrants for all its ships; and, while I agree that we cannot say affirmatively that our entrance into the war would not in that case have excused the defendant's performance, this record does not satisfy me that it would. True the plaintiff did urge upon the Commission that a cancellation of its contract would involve it in loss, and the Commission was obdurate; but, the defendant was in a much weaker position to press such a claim because of its consent. Perhaps it would not have been successful had it not consented; but I do not see how we can say that a priori. After all, although it was at the time a feeble government in exile, it represented a friendly power and an ally, which by hypothesis had not yet agreed to

pool its many ships; and surely it would have been highly desirable to us that it should do so voluntarily. I do not suggest that the Commission could not have forced it to comply, but I do suggest that it might have thought that less than one third[4] the cargo space of the 'Tropic Seas' was not a stake which would have justified coercive measures, while the defendant's consent still remained in abeyance; or indeed a stake which, all things considered, would have justified even a request to repudiate its contract with the plaintiff. Whether such a request unaccompanied by any intimation of coercion would have been an excuse is a question which I am not prepared to answer, and it is not necessary to do so, since my views are not to prevail.

"Therefore, I think that the defendant had the burden of proving (1) either that the Commission would have coerced or at least would have requested the defendant to repudiate its contract; or (2) that the plaintiff would have engaged the space in the 'Tropic Seas,' even if it had known that the defendant had already consented to take out warrants for its ships. Strictly, we might therefore affirm the judgment because of this failure in the proof; but that I think would be scarcely just for the trial was not conducted on any such theory. I would therefore reverse the judgment; but, instead of dismissing the complaint I would remand the cause for a new trial."

### The Testimony of Defendant's Representatives

Not only is the record barren of any evidence of the hypothesized "governmental coercion"; but supposition thereof, on the basis of alleged historical perception or intuition, is precluded in this case by the affirmative testi-

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[4] Actually it was only approximately one-eighth, for the vessel carried 7,806 tons (R. 219).

mony of defendant's representatives negativing and disavowing subservience by defendant to the government of the United States. That testimony is reproduced in an appendix hereto (pp. 48-54, *infra*).

## Basis of Jurisdiction

This petition is presented pursuant to, and invokes this Court's jurisdiction under 28 U. S. C., Section 1254, subdivision 1 (Public Law 773—80th Congress).

## The Questions Herein

In the light of the ground taken in the fourteen page opinion of Judges Clark and Swan, the questions presented herein are:

1. Was the defendant mistaken in formulating and urging its defense in terms of "frustration" by the law, and is "governmental coercion" (assuming its existence) —as distinguished from legal prohibition—sufficient to excuse from performance?

2. Is the true test of legal liability for non-performance of a contract (which, in terms, is unqualified), whether "in fairness and justice" as viewed by the Court the promisor should be held to his promise?

3. Is there any evidence in the record of "governmental coercion"? Does the record show that, as postulated by the prevailing opinion (R. 352-3), "the American government had and exercised an overriding power" over its ally, the equally sovereign Royal Norwegian Government, and that had the latter refused to "accept the Ship Warrants system" its vessels would have been subject to "the President's power to requisition foreign merchant vessels in American waters" under the Act of June 6,

1941, c. 174, 55 Stat. 242, 50 U. S. C. A. App. Sec. 1271 even though under that Act power to requisition foreign merchant vessels was limited to those "lying *idle* in the waters within the jurisdiction of the United States"?

4. May it be assumed, in the absence of evidence, that in November-December, 1941 and thereafter, operation of vessels without "warrants" issued by the United States Maritime Commission under the Ship Warrants Act of July 14, 1941 was so burdensome and impracticable as to be a practical impossibility, in the face of the evidence in the record that a number of foreign governments continued to operate their vessels to and from the United States without such "warrants" (R. 202-3) and in the face of the adjudication in *Baker Castor Oil Co.* v. *Insurance Company of North America*, 60 Fed. Sup. 32 (U. S. D. C., S. D. N. Y., Goddard, J.), affirmed 157 Fed. 2d 3 (C. C. A. 2d Cir.), c. d. 329 U. S. 800?

5. Were the relied on telegrams from an assistant director of the United States Maritime Commission (who acted on his own initiative without consultation with or knowledge of any of his superiors or the legal department of the United States Maritime Commission) coercive, and did they constitute "governmental coercion", when the only evidence in the case, in that regard, is the testimony of defendant's representatives that the dealings between the United States Maritime Commission and the defendant were on the basis of the equality of the sovereignty of the two governments and of mutual consultation and agreement and not that of command and obedience?

6. If, as held by the Court of Appeals, the basis or source of exoneration is defendant's undertaking on October 4, 1941 under the Ship Warrants Act, can it fairly be said that the impediment to performance in this case arose from the "unexpected" "disaster" at Pearl Harbor rather than the October 4, 1941 agreement with the United States

Maritime Commission without which the United States Maritime Commission could not have exercised any authority in the premises?

7. Where, in pleadings and at the trial, a case is presented to the District Court on a defense deliberately formulated and urged by the defendant, and the District Court renders judgment thereon, and, on appeal, the defendant again presents the case on the same theory and ground, is it proper for a United States Court of Appeals not only to reverse the judgment but also dismiss the complaint on a ground and theory formulated by the Court itself?

8. If the test is what is "fair and just", is it fair and just that the defendant should retain the $34,000 additional freight which it received by carrying wool instead of plaintiff's copra? If "fairness and justice" is the guiding goal, should not the courts in such cases prevent a party from being enriched by his non-performance, at the expense and damage of the stranded promisee, by molding a doctrine of constructive trust or agency whereby the profit would belong to the injured promisee?

## Reasons for Granting the Writ

1. It is respectfully submitted that the decision sought to be reviewed constitutes, in the very important field of contract law, a radical departure from, and a reversal of, the law which heretofore has prevailed under the decisions of this Court and the courts throughout the land.

The doctrine ingrained in the common law, it is submitted, is that fairness and justice require that where there is a valid contract, the promisor should be held to his promise (as connoted by the terms used and their fair implication), regardless of how unexpectedly burdensome or difficult performance becomes; that the only permissible course for one unwilling to assume such a burden

is properly to qualify his promise; that it is not fair and just for one to promise unqualifiedly and then seek to excuse himself on the ground of unexpected or unanticipated obstacles (e. g. *Columbus Railway & Power Co.* v. *Columbus*, 249 U. S. 399 (1919); *Carnegie Steel Co.* v. *U. S.*, 240 U. S. 156 (1916); *Day* v. *U. S.*, 245 U. S. 159 (1917); *Northern Pacific Railway Co.* v. *American Trading Co.*, 195 U. S. 439 (1904); *Sun Printing & Publishing Assn.* v. *Moore*, 183 U. S. 642, 654-5 (1901); *Madeirense Do Brasil S/A* v. *Stulman-Emrick Lumber Co.*, 147 F. 2d 399 (C. C. A. 2nd Cir. 1945), c. d. 325 U. S. 861; *Megan* v. *Updike Grain Corp.*, 94 F. 2d 553 (8th C. 1938); *Companhia De Navegacao Lloyd Brasileiro* v. *C. J. Blake Co.*, 34 F. 2d 616, 619 (2nd C. 1929); *The Poznam*, 276 F. 418 (S. D. N. Y., 1921); *Swayne & Hoyt* v. *Everett*, 255 F. 71 (9th C., 1919); *The Simmons Transportation Co.* v. *Alpha Portland Cement Co.*, 286 F. 955 (S. D. N. Y., 1922); *Gottesman* v. *Canada, Atlanta & Pacific Steamship Co.*, 259 F. 298 (E. D. N. Y., 1919); *Canadian Industrial Alcohol Co.* v. *Dunbar Molasses Co.*, 259 N. Y. 193 (1932); *Raner* v. *Goldberg*, 244 N. Y. 439 (1927); *Cameron-Hawn Realty Co.* v. *City of Albany*, 207 N. Y. 377 (1913); *Eppens, Smith & Wiemann Co.* v. *Littlejohn*, 164 N. Y. 187 (1900); *State Mutual Life Assurance Co.* v. *Gruber*, 269 A. D. 170, 54 N. Y. S. 2d 720 (1945); *Thaddeus Davids Co.* v. *Hoffman-La Roche Chemical Works*, 178 A. D. 855, 166 N. Y. S. 179 (1919); *Krulewitch* v. *National Importing & Trading Co., Inc.*, 195 A. D. 544, 186 N. Y. S. 838 (1921); *Arkell & Douglas* v. *N. H. Borenstein & Sons*, 188 A. D. 158, 176 N. Y. S. 581 (1919); *Richards & Co.* v. *Wreschner*, 174 A. D. 484, 158 N. Y. S. 1129 (1916); *119 5th Avenue* v. *Taiyo Trading Co., Inc.*, 190 Misc. 123, 23 N. Y. S. 2d 774 (1947); *Watts, Watts & Co.* v. *Mitsui*, 1918 A. C. 119).

That when there is no prohibition by law "governmental coercion" affords no excuse for the non-performance of an unqualified contract was held directly by this court in *Northern Pacific Railway Co.* v. *American Trading Co.*, *supra*, 195 U. S. 439 (1904), and, in a case analogous to the

one at bar, by the United States Circuit Court of Appeals for the Ninth Circuit in *Swayne & Hoyt* v. *Everett, supra,* 255 Fed. 71 (1919).

Moreover, the very court which decided this case—the Second Circuit Court of Appeals—in *Baker Castor Oil Co.* v. *Insurance Company of North America, supra,* held that the "Ship Warrants system" under the Ship Warrants Act of July 14, 1941 was not coercive in the sense of affording an excuse, "as a restraint of princes", for deviation from a later contract.

The prevailing opinion, it will be observed, relies heavily and almost exclusively on the writings of several scholarly authors who have urged that the decisions in this field of law are outmoded and should be abandoned. Such a departure from established law, it is urged, should be considered and reviewed by this court before it is allowed to become the law of the land.

It seems to petitioner particularly appropriate that there be a review by this court in the light of the fact that the judges below have divided evenly—2 to 2—District Judge Goddard and Chief Circuit Judge L. Hand holding one way and Circuit Judges Clark and Swan holding the other way.

2. The Court of Appeals for the Second Circuit being located in the business nub of the country, its decision herein is bound very substantially to affect the course of decision in that most important business section of the world. The decision (if not reversed), of course, will be binding as a precedent on the federal courts in that circuit. In addition, because of the prestige and high repute of that court, the decision is likely to influence the course of decision in many other jurisdictions, State and Federal.

If the decision is erroneous, the injustice and error which it will thus work should, it is submitted, be avoided.

Moreover, since the decision is a conscious and almost express alteration of the law as previously expounded and applied, petitioner respectfully urges that the decision should be reviewed and considered by this Court before it has a revolutionary effect on this branch of contract law.

3. The decision sought to be reviewed casts a serious reflection upon the Government of the United States, in the assumption that because of the distress in which the Royal Norwegian Government found itself as a result of its having been overrun by the Hitler forces, "the American Government had and exercised an overriding power" over the Norwegian Government and subjected the latter to "coercion" under threats of taking measures in respect to its vessels and property somewhat akin to the force which Hitler had exercised.

As already pointed out, the defendant has made no such representation; its witnesses testified directly to the contrary; no one has made a charge of that character.

4. The decision is of substantial importance to the plaintiff since it deprives it of an over $91,000 judgment. If, as is verily believed, that decision is contrary to the law and is contrary to the course of decision which heretofore has been followed by this court and the courts throughout the land, there is here a deprival which, it is submitted, it would be unjust not to correct.

## The Appended Brief

A more detailed consideration of the decision sought to be reviewed and its abandonment of ingrained precedent appears in the appended brief.

## Prayer

WHEREFORE petitioner respectfully prays that this Petition for a writ of certiorari to review the complained of judgment be granted.

Dated, New York, February 1, 1950.

L. N. JACKSON & Co., INC.

By COPAL MINTZ,
Attorney for Petitioner.

# Supreme Court of the United States

OCTOBER TERM—1949

No. .

L. N. JACKSON & CO., INC.,

Petitioner,

*against*

THE ROYAL NORWEGIAN GOVERNMENT,

Respondent.

## PETITIONER'S BRIEF IN SUPPORT OF THE FOREGOING PETITION FOR A WRIT OF CERTIORARI

### Preliminary Statement

Since the foregoing petition contains an adequate statement of the opinions below (pp. 2, 6-12, *supra*), the basis of jurisdiction (p. 13, *supra*), the facts, to the extent material (pp. 3-6), and the questions involved (pp. 13-14, *supra*), those matters are not repeated here.

This brief is intended merely to supplement the petition in only one respect—*to demonstrate that the 2 to 2 prevailing decision herein is a radical departure from, and constitutes a reversal of, the law* in such a vital branch of jurisprudence as the law of contracts.

## Summary of Argument

I. The authorities cited in the prevailing opinion do not countenance the enunciation—and reject the doctrine—that, even though a contract is valid and binding, the law does not hold the promisor to performance if, in the circumstances of the case, it appears to a court that "in fairness and justice" the promisor should not be held to his promise (pp. 22-44, *infra*).

II. The authorities cited in the prevailing opinion do not countenance "governmental coercion"—as distinguished from frustration by law—as releasing a promisor from liability for non-performance (p. 44, *infra*).

III. Other authoritative decisions—decisions not mentioned in the prevailing opinion—rule out "governmental coercion" as an excuse (pp. 44-46, *infra*).

IV. No "new circumstances" require or justify the disregard or reversal of the well-settled principles of law in the field of contract jurisprudence which are involved here (p. 46, *infra*).

V. The factual hypothesis of the prevailing opinion—that the defendant was "coerced" by the Government of the United States which exercised and exerted an "overriding power"—are without the slightest basis in the record and directly contrary to the testimony of the defendant's witnesses (p. 47, and appendix, pp. 48-54, *infra*).

## I.

**The authorities cited in the prevailing opinion do not countenance the enunciation—and reject the doctrine—that, even though a contract is valid and binding, the law does not hold the promisor to performance if, in the circumstances of the case, it appears to a court that "in fairness and justice" the promisor should not be held to his promise.**

This brief does not undertake an examination of the authors referred to in the prevailing opinion, nor a comparison of their writings with views on the subject expressed by other eminent writers, for—whatever may be the impact of those dissertations on the minds of the judges—there necessarily is a variance between the products of such unilateral thinking and the legal principles which the courts apply as the result of their long course of resolving concrete conflicts, in the light of the fuller understanding of all sides wrought by adversary presentation and scrutiny.

Therefore, we proceed to test what is said in the prevailing opinion of Judge Clark with the cases therein referred to—in the order in which they appear therein.

*The Isle of Mull,* 257 F. 798 (D. C. Md. Rose, D. J., 1919), reversed 278 F. 131 (4th C. 1921), c.d. 257 U. S. 662, was a case of true frustration of a charter party by the lawful requisition by the British Admiralty of the chartered British vessel owned by a British corporation.

The District Court, recognizing the frustration, nevertheless held that, *as a matter of justice and equity,* the charterer should receive the amounts which the owner was paid by the British Admiralty in excess of the stipulated charter hire during the period of the charter party, for, otherwise the frustration and consequent non-performance would result in the enrichment of the non-performer at the expense of the promisee.

The Circuit Court of Appeals was much impressed with the justice of that determination and catalogued "the strong reasons in favor" of it. Nevertheless it felt itself constrained to reverse the judgment for the amount of the owner's enrichment because, as a matter of law, the actual requisition by a government in the exercise of its governmental power over its nationals and over its ships "completely frustrated the contract and put an end to all rights of both parties." The Circuit Court discountenanced the embarking by the courts on an effort to adjudicate controversies over business contracts in accordance with a judge's appraisal of the equities, in these words (at p. 135):

> "The hardship of applying [the rule of law] to some cases in the meantime cannot be denied, but it will be found in the practical administration of justice better to allow even this hardship than for courts to enter upon the confusing, if not impossible, task of adjusting the equities. * * * The effort to measure [the] * * * factors entering into the adjustment of the equities would involve the parties in intricate and costly litigation and delay."

Certiorari was denied by this Court.

*The Texas Co.* v. *Hogarth Shipping Co.*, 256 U. S. 619 (1921), likewise, was a case of true frustration by lawful governmental requisition. There is nothing in the facts or opinion in that case which lends support to the opinion of Clark, J., in this case. The subject of the charter party in that case was a British vessel owned by a British corporation. "While in British waters and being provisioned for the intended voyage" the vessel "was requisitioned by the British Government and pressed into war service" (at p. 626). "The owner made the usual preparations for complying with the charter party, earnestly sought to prevent the requisitioning of the vessel, urged the existence of the charter party as a reason for leaving her free, and

respected the requisition when made, because no other course was reasonably open" (at p. 627).

Upon those facts this Court said (at pp. 627-8):

> "As the ship was British and in British waters and the owner was a British corporation, the power of the British Government to requisition the ship is beyond question."

This Court held further that since the continued availability of the vessel was necessary to the performance of the charter party, the contract necessarily "must be regarded as subject to an implied condition that, if * * * without the default of either party the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it".

Continuing its exposition, this Court took the pain to say that the principle did not apply where the terms or nature of the contract did not import the implication "nor where performance is not practically cut off but only rendered more difficult or costly. * * * Here the ship * * * was rendered unavailable for the performance of the charter party by the requisition" and thus "compliance of the charter party was made impossible by an act of state. * * * The important consideration is that [the contract] became impossible of performance through a supervening *act of state* which *operated directly on the ship* and *the parties could not avoid*" (at p. 631).

The *Tornado,* 108 U. S. 342 (1882), also was a case of true and absolute frustration. There the disabling occurrence was the accidental burning of the vessel. That involuntary destruction terminated the contract because the continued availability of the vessel was a *sine qua non* of the contract and thus an implied condition thereof.

*Moore & Tierney, Inc.* v. *Roxford Knitting Co.,* 250 F. 278 (N. D. N. Y. 1918), aff'd 265 F. 177 (2nd C.), c. d. 253 U. S. 498, was a case of frustration by imperative law.

Nothing in the opinions therein give countenance to what has been said in the case at bar. The National Defense Act of June 3, 1916, c. 134, 39 Stat. 166, and the Naval Appropriations Act of March 4, 1917, c. 180, 39 Stat. 1168, were construed, in accordance with their express provisions as making it obligatory upon manufacturers to accept government procurement orders and give them priority, under penalties of fines and imprisonment and plant requisition. Therefore, if compliance with orders placed by the government under the Acts "made it impossible" for the contractor to fill contracts with private individuals, the latter contracts ended. "In such case or cases it is clear that, under the provisions of the Acts of Congress referred to, performance * * * was made impossible by the act and requirements of the United States Government." However, added the court, if a party (emphasis supplied)

> "thinking it more profitable *or patriotic,* to work for the government than in the performance of its existing contract with B, *voluntarily* sought a contract with the government * * * and *voluntarily* entered into such a contract sought by it with the United States * * * *he is not excused,* * * * In such case performance * * * is not prevented by act of God, or viz major. Nonperformance is the result of his voluntary act or acts, not that of the government, and he acts under no compulsion whatever" (at pp. 281-2).*

The Circuit Court of Appeals for the Second Circuit (Ward, Rogers and Hough, C. J.) in an affirming opinion by Judge Rogers said:

> "It is not questioned that, if a party by his contract charges himself with an obligation possible to be performed, he must make it good, unless performance is rendered impossible by the act of God, the law or the

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* See directly in point *Chicago & Eastern Ill. Rwy. Co.* v. *Collins Produce Co.,* 249 U. S. 186 (1918).

other party. If what is agreed to be done is possible and lawful, it must be done. *Sun Printing & Publishing Assn.* v. *Moore,* 183 U. S. 642; *Carnegie Steel Co.* v. *U. S.* 240 U. S. 156, 165. The plaintiff admits that it entered into contracts with defendant which it did not completely perform within the time agreed upon. The performance was not prevented either by act of God or the other party. Was it prevented by the law? If not, was performance excused under the clause in the contracts declaring that the obligations assumed were subject to 'delays or nondelivery caused by * * * any other reasons beyond our control?' " (at p. 178).

"If the orders [by the government for plaintiff's manufacture of goods] were contracts voluntarily made, we agree that the performance of contracts so made was not entitled to precedence over other contracts previously taken" (at p. 180).

*E. Hulton & Co., Ltd.* v. *Chadwick & Taylor,* 34 T. L. R. 230 (1918), also, was a case of true frustration by the law of the land of which both the plaintiff and the defendant were subjects and where the contract was to be performed. Nothing in the opinion in that case gives support to the judgment in this case.

The *Kronprinzessin Cecile,* 244 U. S. 12 (1917), like *The Texas Co.* v. *Hogarth Shipping Co., supra,* turned upon an implied condition. Performance of the contract with the plaintiff in that case, as well as performance of the contracts with the other shippers and with the passengers, depended upon the safety of the ship. Therefore the contracts imposed upon the carrier the obligation of reasonable vigilance in safeguarding the ship. Consequently what the master, reasonably and in good faith, deemed necessary for the safety of the ship and of the cargo and the passengers was in performance rather than in breach of the contract. Hence, the master acted within the scope of the contract as the nature of the engagement has been understood for generations. The necessity of the safety

of the ship is so obviously vital to all contracts of carriage by sea that, in the historical development of maritime law, it has been the mutual and joint concern of the owners of the cargo no less than of the owner of the vessel; therefore, the master, in a sense, has been viewed also as the agent of the owners of the cargo (see The *"Julian Blake"*, 107 U. S. 418 (1882)).

There is no analogy whatsoever between that and this case—factually or legally. No question of safety of the vessel was involved here. The principles there enunciated provide no support for exculpation of a voluntary and wilful choice not to perform in furtherance of a purely voluntary at-will commitment to a government which had no sovereign jurisdiction in the premises.

*W. J. Tatem, Ltd.* v. *Gamboa*, 1939 1 K. B. 132, contains nothing other than strict definitions of frustration. It was there held that frustration occurs when the thing upon which performance depends ceases to exist through circumstances beyond the control of the parties.

*F. A. Tamplin Co.* v. *Anglo-Mexican Co.*, 1916, 2 A. C. 397, was another case of the requisition by Britain of a British vessel. There was no disagreement among the judges as to the effectiveness of the requisition to prevent performance during the period of requisition and the supervention thereof over the five year charter party between the parties. The disagreement was over whether the requisition effected a complete frustration of the charter party or merely modified it or suspended it, and that disagreement was not due to divergence of view as to the underlying legal doctrine. Viscount Haldane of the minority expressed no dissent from Earl Loreburn of the majority who said that the only allowable principle upon which the courts proceed is the existence of a releasing "implied condition in the contract * * * *for no court has an absolving power*" (at p. 404). Since charter parties are dependent upon the "continued availability" of the vessel,

there necessarily is an implicit condition (unless affirmatively negatived) that when the vessel ceases to be available "by reason of circumstances beyond the control of the parties" the charter party "comes to an end".

That was repeated by Lord Haldane several years later, in *Bank Line Ltd.* v. *Arthur Capell & Co.*, 1919 A. C. 435, where a vessel which was the subject of a charter party was requisitioned by the government of which the owner of the vessel was a national and whose flag the vessel flew. He there said (at p. 445):

> "What is clear is that when people enter into a contract which is dependent for the possibility of its performance on the continued availability of the subject matter, and that availability comes to an unforeseen end by reason of circumstances over which its owner had no control, the owner is not bound unless it is quite plain that he has contracted to be so."

In the same case Lord Sumner remarked that it was "well-settled that the principle of frustration of an adventure assumes the frustration arises without blame or fault on either side. Reliance cannot be placed on self-induced frustration" (at p. 452).

Directly contrary to the rationale of the prevailing opinion in this case, Lord Sumner said that cases of this character should not be disposed of according to a jury's view "of what is fair between man and man" (see p. 459), but on rules capable of objective application without regard to what may be deemed the "equities" of a particular case. Lord Sumner did not claim for judges a power of subjective disposition according to individual views which he held improper for collective consensus and judgment by juries (cf. the later decision by the C. C. A. 4th Cir. in *The Isle of Mull, supra* at pp. 22-3).

*Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corp., Ltd.*, 1941 2 All Eng. R. 165, concerned

itself solely with a question of burden of proof which is not presented in the case at bar. There the performance of the contract was frustrated by an explosion of the vessel which everybody agreed excused performance unless such explosion was caused by the defendant or its employees. The presentation of all of the available proof left the causation of the explosion a mystery. In those circumstances, it was decided that the presumption of innocence and absence of fault led to the exculpation of the defendant. The opinions rendered in that case seem to petitioner significant here for the following contents.

Viscount Simon, L. C., said (emphasis supplied):

> "* * * There is no doubt of course that * * * 'self-induced' frustration provides no defense. Thus in Mertens v. Home Freeholds Co., Lord Sterndale, M. R., observed, at p. 536: 'It has never been held that a man is entitled to take advantage of circumstances as a frustration of the contracts if he has brought those circumstances about himself' * * * Similarly * * * Lord Wright * * * laid it down. * * * 'The essence of "frustration" is that it should not be due to the act or election of the party' " (p. 169).
>
> "The most satisfactory basis, I think, upon which the doctrine (of frustration) can be put is that it depends on an implied term in the contract of the parties. * * * It has the advantage of bringing out the distinction that there can be no discharge by supervening impossibility if the express terms of the contract bind the parties to performance notwithstanding that the supervening event may occur. *Discharge by supervening impossibility is not a common law rule of general application like discharge by supervening illegality.* Whether the contract is terminated or not depends on its terms and surrounding circumstances in each case. * * * Every case in this branch of the law can be stated as turning on the question whether,

from the express terms of the particular contract, a further term should be implied which, when its conditions are fulfilled, puts an end to the contract" (p. 171).

Viscount Maugham observed that "the contract automatically comes to an end * * * provided only that the event is 'caused by something for which neither party was responsible' " (p. 177).

Lord Russell of Killowen said:

"* * * as a general rule, impossibility of performance does not release from liability the person who promised the performance. An exception, however, exists in the case of contracts the performance of which is necessarily dependent in the continued existence, or the continued existence in sound condition, of a person or thing" (p. 180).

Directly contrary to the doctrine enunciated in the prevailing opinion in this case are the following remarks by Lord Wright:

"* * * the court is not claiming to exercise a dispensing power, or to modify or alter contracts. The parties did not express the qualification because they did not think of the possibility of the occurrence * * *" (p. 186).

* * * * * *

"The explanation which has been generally accepted in English law is that impossibility or frustration depends on the court implying a term or exception and that as part of the contract" (p. 187).

The principle rests, he continued, "on the true meaning of the contract, as it appears to the court. The essential feature of the rule is that the court construes the contract, * * *" (at p. 187).

In *Madeirense Do Brasil S/A* v. *Stulman-Emrick Lumber Co.*, 147 F. 2d 399 (C. C. A. 2nd Cir. 1945, Swan, Clark and Frank, C. J.), c.d. 325 U. S. 861, a seller in Brazil contracted with a buyer in New York on December 5, 1940, to ship certain lumber "up to December 31, 1940". The contract was entered into in contemplation of shipment on a vessel for which arrangements had been made and at an agreed upon freight rate of $14. The vessel thereafter refused to take the lumber. Substitute carriage was extremely difficult to procure and, if procurable, only at a freight rate of over $33. In those circumstances, the seller declared the contract "canceled on account of force majeur * * *"

Under the reasoning of the prevailing opinion in this case, the court should have said that since the contract had been entered into in the expectation by both parties that the arranged for vessel would carry the lumber and do so at the agreed upon rate of $14, the radical change of conditions through no fault of the seller, in fairness and justice, exonerated the seller from his contract.

Directly to the contrary, however, did Judge Clark write in that case (emphasis supplied):

> "Even had there been no ships available, plaintiff was not under the circumstances of this case excused from performance. The plaintiff's [seller's] letters indicate clearly that at the time of the making of the contract * * * it was aware of the fact that boats were at a premium. * * * There was no startling change in conditions. * * * *Hence the lack of ships in January 1941 was a foreseeable risk which plaintiff willingly took upon itself;* and it cannot under such circumstances plead the defense of 'force majeur'. Companhia De Navegacao Lloyd Brasileiro v. C. G. Blake Co., supra, 34 F. 2d at p. 619."

In the case last cited, the court refused to exonerate a seller because of extreme difficulty in procuring shipping accommodations where it appeared that the parties contracted with knowledge of those conditions. Judge Learned Hand, writing for himself and Judges Swan and Augustus Hand, said: "* * * this was a risk which both parties well understood, and in the face of which the seller made his engagement". Therefore, the seller was bound to perform his engagement irrespective of the conditions beyond his control.

On a parity of reasoning, Judge Clark in this case should have written that the defendant having contracted with the plaintiff at a time when (according to the construction of its "undertaking" to the Maritime Commission which defendant successfully urged upon the courts below), it had engaged itself to follow directions by the United States Maritime Commission as to what to carry and what not to carry—even to the point of giving the Commission authority to direct the non-fulfillment of an unqualified contract entered into with the Commission's express approval—it, the defendant, "willingly took upon itself" the risk and consequence of such an obstacle to performance, when, and in the face of its commitments, it unqualifiedly contracted with the plaintiff to carry plaintiff's 1,000 tons of copra.

The important circumstance here cannot be an assumption that defendant expected the United States Maritime Commission to abstain from exercising the contractual authority which it is said the defendant had granted to the Commission, or that the defendant did not foresee the arisal of an occasion for the exercise of that contractual authority. The controlling consideration is that (according to the defendant and the courts below) such contractual authority had been granted. In consequence, the possibility or likelihood of the exercise thereof plainly was "foreseeable" by the defendant. Surely, one who deliber-

ately and knowingly grants contractual authority cannot be heard to plead that he did not foresee the likelihood or possibility of its exercise. Why is authority asked and given if not in anticipation of its exercise—at least so that it might be exercised?

It will be observed that in the cited case, the fact that parties contracted unqualifiedly in the face of unusual circumstances known to both and risks foreseeable by both, was held by Judge Clark (following the established rule of construction) to preclude the implication that interference with performance by the foreseeable contingencies would excuse performance. In the case at bar, however, Judge Clark adopted diametrically contrary reasoning and construction and, to bring plaintiff into the orbit of a thus inverted rule, he imputed to the plaintiff (without an iota of evidence) knowledge of, and complete familiarity with, defendant's contract with the United States Maritime Commission.

The illogic of the holding in this case, it seems to petitioner, is indicated by (1) not only its head-on conflict with the rule of construction heretofore unanimously applied, (2) not only by the necessity of charging the plaintiff, as a matter of law, with as complete and intimate a knowledge of the defendant's business and commitments as the defendant itself possessed, but (3) also by the fact that since defendant certainly must be presumed to have fully known its own business and its own outstanding commitments, it follows that had defendant intended its engagement with the plaintiff to be purely conditional and subject to cancellation in the event of a request therefor by the United States Maritime Commission, it would have said so very plainly by such a simple statement as "subject to cancellation at the request of the United States Maritime Commission."

It seems to petitioner strange reasoning indeed that fairness and justice should be deemed to require that the court

insert a provision which the defendant knowingly failed to include.

In the next case cited, *Allanwilde Transport Co. v. Vacuum Oil Co.*, 248 U. S. 377 (1918), there was an absolute frustration by law since the sailing in that case was absolutely prohibited by the lawful denial of clearance from New York.

*The Claveresk*, 264 F. 276 (C. C. A. 2nd Cir., 1920, Rogers, Hough and Manton, C. J.), affirming 254 F. 126 (L. Hand, J.), like most of the other cases mentioned in the opinion, was an instance of a charter party frustrated by the requisitioning by the British Admiralty of a British vessel. In that case the charter party was entered into in 1913 by a British corporation as owner and a Pennsylvania corporation as charterer. It contained the usual "break down" and "restraint of princes" clauses. On January 25, 1917, the owner, at its home office in Newcastle, England, received notice of requisition of the vessel. Pursuant to that notice the vessel thereafter went into government service at a rate of hire greater than specified in the charter party. In an action for damages by the charterer, the owner "substantially pleaded the requisition (1) as a restraint of princes; (2) as a frustration of the commercial adventure between the parties". The court found that the owner "did not voluntarily—*i.e.* did not seek to—withdraw the Claveresk from libellant's service, nor ask nor induce the government to requisition."

In holding, in those circumstances, that the requisition by the British government of a British vessel from a British owner located in England was a yielding "to that restraint of princes" which was provided for in the charter party, the court, in an opinion by Hough, C. J., said:

> "* * * The fundamental essential of a restraint of rulers is that the restraining act should be governmental. Northern, etc. Co. v. American etc. Co., 195 U. S. 467 * * *.

> • • • No citizen or subject is by lawful private contract either required to or justified • • • in resisting or evading the compulsion of its government".

In *Edward Maurer* v. *Tubeless Tire Co.*, 285 F. 113 (C. C. A. 6th Cir., 1922), the contract, by its terms, was expressly subject to all rules and regulations imposed by the United States Government.

*New York Trust Co.* v. *Securities Exchange Commission*, 131 F. 2d 274 (C. C. A. 2nd Cir., 1942), c.d. 318 U. S. 786, held that where a valid and binding order of the Securities Exchange Commission dissolved a corporation, such dissolution necessarily called for the liquidation of the unmatured obligations and, therefore, contract provisions for the payment of premiums in the event of *voluntary prepayment* had no application. That was a plain case of termination of a contract by law or by lawful act of government having the force and mandate of law.

Similarly, *Patch* v. *Solar Corp.*, 149 F. 2d 558 (C. C. A. 7th Cir., 1945), c.d. 326 U. S. 741, was a case of suspension of a contract by inexorable legal prohibition. In that case the manufacture of the article which was the subject of the royalty contract was prohibited by law, and the court held that the royalty provisions were suspended coterminously with, and during the period of, the prohibition of manufacture. Again, the prohibition was imposed by a government upon its citizens within its territory, and the parties had no lawful alternative to obedience of their sovereign.

While the prevailing opinion in this case disposes of the same court's prior decision in *Baker Castor Oil Co.* v. *Insurance Company of North America*, 60 Fed. Sup. 32 (S. D. N. Y., Goddard, J.), affirmed 157 F. 2d 3 (1946), c.d. 329 U. S. 800, as "not in point", it is respectfully submitted that the *Baker Castor Oil Co.* case is squarely in point, because therein the courts held that the compliance by the government of Brazil, in its operation of a ship-

warrant-holding Brazilian vessel, with a directive of the War Shipping Administration (the successor to the regulatory functions of the United States Maritime Commission), legally, was voluntary as an act of choice by the Brazilian government as owner, and was not an act of state. What the Brazilian Government did, it was held, was not in mandated obedience to the United States Government as sovereign and certainly not as sovereign over Brazil.

The facts virtually completely parallel those of the case at bar. Yet, therein the same court with the concurrence of Clark, J., found no occasion for ascribing to the United States Government the exercise of "coercive power" nor did it find therein a practical necessity to Brazil to do as bidden by the Shipping Administration. There Judges Augustus N. Hand, Chase and Clark, speaking through Judge Chase, in affirming the District Court (Goddard, J.), said:

> "The District Court correctly held that there were no acts by either the Government of Brazil or that of the United States constituting a sovereign restraint within the terms of this war risk policy * * *. What Lloyd Brasileiro did as a private owner and with regard only to its own ships was not the exercise of any sovereign power. Nor were the acts of the War Shipping Administration and its branches an exercise of the sovereign power of the United States. Rather, those acts were the exercise of a right *voluntarily conferred* upon the War Shipping Administration by the owners in order to secure the warrants and hull insurance. The United States did not purport to deny all rights to any owner not obeying its rules * * *" (emphasis supplied).

In the District Court, Goddard, J., said in that case that "there is no evidence indicating" that had the vessels gone to the destination contracted for "they would have

incurred any penalty other than forfeiting their right to the priorities which they gained from the ship warrants and voiding their insurance". The election to avoid such detriments to it is "voluntary conduct of the owner, however strong are the motives * * * for so acting".

*Mawhinney* v. *Milbrook Woolen Mills,* 231 N. Y. 290 (1921), does no more than parallel *Moore & Tierney, Inc.* v. *Roxford Knitting Co., supra* at pages 24-26. The New York Court of Appeals construed the 1916 National Defense Act as making the acceptance of and compliance with government procurement and purchase orders "obligatory" and the giving of preference and priority thereto as mandatory. Therefore, the court held that if, and to the extent that, such mandated orders actually prevented compliance with private contracts, there was presented a case of true frustration by law. The limitations of the principle are pointed out in the later decision in that case (234 N. Y. 244) rendered after retrial. The New York Court of Appeals there said that "it does not follow that defendant could ignore plaintiff's rights entirely. It was bound to do the best it could for him under the circumstances * * *. With all the indulgence conceded to the manufacturer by this Court in its former decision, no intimation was given that it might unnecessarily ignore the claims of its private customers prior to November 24, 1917" when defendant's plant was completely requisitioned by the government.

In *Nitro Powder Co.* v. *Agency of Canadian Car & Foundry Co.,* 233 N. Y. 294 (1922), "the contract", said the court, "is *in terms* conditional on governmental inaction and subject to the condition that if the government should requisition the goods and render it impossible that the seller should perform its contract, performance should be excused". There was such a governmental requisitioning under express statutory provision. "Defendant had no control over the situation", said the court; "defendant merely acquiesced in action which it had no power to stop

* * *. It cannot be said that the taking by the government was induced or procured by the defendant. Defendant was not an unwilling party, but the taking was not dependent upon its consent. No doubt it was complaisant if not eager. That its attitude had any effect upon the result is purely speculative * * *. The case is destitute of the suggestion that after the contract in suit was made defendant went to the government and brought the material to its attention, or induced it to action where inaction was imminent". Plainly, that is no authority for exoneration when non-performance is a purely voluntary preference resulting from the exercise of freedom of choice.

The decision by the trial court in *L. N. Jackson & Co. v. Seas Shipping Co., Inc.*, 185 Misc. 94, in so far as it deals with the question of frustration, held only that the Seas Shipping Co., Inc., a New York Corporation (which in that case mistakenly was sued as the contracting party), was bound to obedience of an order issued by the United States Maritime Commission. But the contract herein in fact, as that court held, was not by or with the Seas Shipping Co., Inc.; the contract was by and with the Royal Norwegian Government who itself was a sovereign, on a par with and not in any way subject or subordinate to, the sovereign power of the United States. Not a word in the opinion, or in the findings or conclusions, of the New York Supreme Court relates to the exculpability of the Royal Norwegian Government. It is apparent from the record that the New York Court of Appeals affirmed the judgment in favor of the Seas Shipping Co., Inc. solely on the ground that having contracted in behalf of the Royal Norwegian Government as a disclosed principal, the Seas Shipping Co., Inc. had no contractual obligation and, therefore, could not be liable for any breach of contract. This appears from the fact that the court refused to certify that it had passed on any federal question (R. 50, 61-2, 81-4, 187, 231-2; Plf's Exs. 4, 5, admitted at R. 231-2 and printed at R. 244-4, 246-250; see also 296 N. Y. 529).

In the last case mentioned in the prevailing opinion, *Nash* v. *Southern Pacific Co.*, 260 F. 280 (D. C. N. D., Cal. 1919), petitioner can find nothing in point.

**Summary of the Cases Cited in the Prevailing Opinion**

The foregoing digest and discussion of each of the cases referred to in the opinion of Clark, J., make clear, it seems to petitioner, that the decision herein is contrary to every case cited on the subject.

1. None of the referred to decisions suggests that where legal prohibition of performance of a contract is absent, the test of the excusability of non-performance is whether, in the light of the circumstances known to the parties at the time of contracting and as altered by subsequent events, the promisor, "in fairness and justice", should be held to his promise.

Indeed, such a subjective nebulous concept as a practicable basis for the determination of rights and liabilities under business contracts, was considered in *The Isle of Mull, supra* pages 22-23, 278 F. 131, c.d. 257 U. S. 662, only to be emphatically rejected.

That idea was rejected also by Viscount Haldane in *F. A. Tamplin Co.* v. *Anglo-Mexican Co., supra* at page 27, when he said "no court has an absolving power" and by Lord Wright in the more recent case of *Joseph Constantin Steamship Line, Ltd.* v. *Imperial Smelting Corp., supra* at pages 28-30, when he said that courts do not "exercise a dispensing power".

Surely, a claim of novelty in circumstances cannot justify a reversal in that regard, for whatever may be said about the impact of new conditions upon the law, certainly the striving for, and the concept of, fairness and justice are ancient and perennial; old, too, is the problem of non-performance of contracts when the unusual occurs. Therefore, if it were practicable, and legally and socially de-

sirable, to make the determination of the liability in such cases dependent upon the court's view of what was fair and just in the particular case, that doctrine would have been enunciated long, long ago.

The unacceptability of such an absence of objective standard or workable formula seems patent. "Fairness and justice", however idyllic, obviously furnish no rule, no guide. Judges, no differently from other men, on the same facts and circumstances, come to opposing conclusions as to what is fair and just. Much depends upon which, of what may appear equally logical major premises, is accepted or selected as the vantage point. That may be conditioned by, and varies with, the judges' personality and experience in life. Some are exacting; others, lenient or indulgent. If the personal nature and outlook of the judge were to be determinative, how would businessmen know when they have firm contracts on which they can rely for either performance or full indemnification in the event of non-performance?

Heretofore, the settled rule has been that every party is held to his valid contract and is required to perform (except when otherwise stipulated or implied) unless performance is probibited by law or rendered impossible by an act of God. Those rules furnish practicable and objective tests capable of uniform application. It is submitted that there have been no "new circumstances" which warrant or call for a judicial alteration of that long-enforced basic principle of contract law.

2. None of the referred to cases countenances "governmental coercion", as distinguished from true *vis major*, as sufficient to excuse performance of a contract which a party lawfully and in fact could perform.

Indeed, as late as 1946, the United States Circuit Court of Appeals for the Second Circuit unanimously (with the participation of Clark, J.), and the apparent concurrence of this Court, refused to hold compliance with a directive

of the War Shipping Administration under the Ship Warrants Act as a "restraint of princes" (*Baker Castor Oil Co.* v. *Insurance Co., supra* at pp. 35-37).

The problem of interference with the performance of private contracts by governmental action is not one which arose only recently. The techniques used during the recent war were fully developed during the First World War. The fact that there was a broader use of them does not change the underlying principles.

It is made abundantly clear in all of the cases that only where there is an "act of state" which is binding and mandatory on the promisor and which allows the promisor no alternative to non-performance of his private contract, is there a legal absolution from the private contract. In other words, there must be true frustration by law—by the law itself or a lawful act of government in its sovereign capacity which has the force of law. Voluntary election, in the legal sense—whether out of patriotism or the baser motive of more profit—to perform a contract with the sovereign, expressly was said to furnish no excuse in *Moore & Tierney, Inc.* v. *Roxford Knitting Co., supra* at pages 24-26, 265 F. 177, c.d. 253 U. S. 498. Such a voluntary preference to serve one's government, at another's expense, does not present a case of prevention "by act of God or vis major" and "is the result of * * * voluntary * * * acts, not that of the government" (*id*).

If the exigencies of total war had been thought to require setting aside and nullification of all contracts, or the elimination of private claims under contracts voluntarily ignored by parties in their fervor to render what appeared to them a service more helpful to the war effort, Congress, as the law-making branch of the government, would have so legislated. Is it gainsayable that such absolution is a matter of law making, not judicial construction of contracts?

3. Except where there is true frustration by law contingencies beyond a party's control excuse performance, in the absence of a provision therefor, only when a provision for such exoneration is implicit in the nature or provisions of the contract. That implied condition is the sole permissible basis of exoneration is virtually the unanimous holding of all the authorities.

Therefore, under the cases cited in the prevailing opinion the result reached therein is justifiable only if, as a matter of contract construction, the defendant's contract with the plaintiff may and should be read as embodying (1) a reference to the fact that the defendant had contracted with the United States Maritime Commission to place all its vessels, or the "Tropic Star" in particular, under the complete supervision and control of the United States Maritime Commission, (2) a statement that, under that contract, the Commission is authorized to request cancellation of the engagement to the plaintiff and in that event defendant would be obliged to and would cancel, and (3) accordingly, the engagement was subject to cancellation if and when requested by the United States Maritime Commission.

Is it reasonable to say that is what the parties meant by their words? Is that what a reader of the contract on November 7, 1941 would have understood it to say? *All the decisions, other than the 2 to 2 prevailing decision in this case, say no.*

Under the law as understood and applied heretofore, because the contract, as written, was dependent for performance upon the continued availability of the "Tropic Star", it was impliedly conditioned upon the "Tropic Star" not ceasing to be available through an act of God or action by the enemy or other true *vis major* or unavoidable accident. That condition was inherent in the nature of the engagement and, therefore, under well-settled law, implicit in the contract.

But under the same well-settled law, interference with performance by conditions which the defendant itself voluntarily brought on or by the obligations of a conflicting contract in which the defendant voluntarily entered, were not implicit in—but directly in conflict with—the engagement to which defendant signed its name and on which the plaintiff, in good faith, relied. This contract cannot be read differently without reversing existing law and setting up as the law the converse of what heretofore has prevailed.

It should not be overlooked that, in characteristic fashion, the contract was written by the defendant; that the writing of, and entry into, such contracts was part of defendant's regular course of business; that this was a business engagement of defendant's own election; that the plaintiff, no differently from others, had the right to assume that the defendant was acting with full knowledge and appraisal of its outstanding commitments. Surely, plaintiff had the right to assume that the defendant knew what it was at, and plaintiff had the right to take defendant at its word.

A business engagement should not be presumed to have been intended as an illusory or misleading promise. That the plaintiff placed in the contract full reliance is established by the stipulated proof that the plaintiff did not contract for the copra until the defendant, by a firm contract, had engaged itself to transport it (R. 241).

If the defendant intended that its promise should not be depended upon and was to be understood by plaintiff as purely contingent, it easily could have, and, as a matter of fair-dealing, should have, said so (*Carnegie Steel Co.* v. *U. S., supra,* 240 U. S. 156, at p. 165). It could have done so by a simple clause. Plaintiff then would have had the choice of whether or not to contract on that basis.

Since the above facts and considerations are typical, the far reaching consequences of the decision herein seem apparent.

## II.

**The authorities cited in the prevailing opinion do not countenance "governmental coercion"— as distinguished from frustration by law—as releasing a promisor from liability for non-performance.**

This, it is submitted, is evident from the digest of the cases cited in the prevailing opinion, and is highlighted by *Baker Castor Oil Co.* v. *Insurance Co. of North America* (*supra* at pp. 35-37).

In every case where a party was exonerated because of prevention by governmental requisition or by priority mandated for government contracts, it was emphasized that the controlling consideration was the absence of legal alternative to compliance with the governmental mandate.

In every one of the cases, the governmental action was by the government in its sovereign capacity and the promisor owed allegiance to, and was subject to the jurisdiction of, the government; compliance was absolutely mandatory.

## III.

**Other authoritative decisions—decisions not mentioned in the prevailing opinion—rule out "governmental coercion" as an excuse.**

The prevailing opinion is significant for its omission of any mention of *Northern Pacific Railway Company* v. *American Trading Co.*, 195 U. S. 439. In that case, the "governmental coercion" was not a matter of hypothesis

in the absence of evidence. It was established beyond dispute. It was real. It was imperative. It was irresistible except by litigation which would have meant costly delay. But, in point of law, the action of the Collector of the Port was unlawful. Compliance therewith, therefore, was held no excuse when it resulted in failure to perform a contract.

The Collector's erroneous action, this Court said "should not be at the expense of the shippers who had obtained this contract for transportation while all parties actually knew the difficulties that might concern the exportation".

Although the act of the governmental official made clearance of the vessel with the plaintiff's goods thereon impossible, that, it was held, "did not render unlawful the contract to transport" and, since the Collector's act was contrary to the law "it was not an act of the state"; therefore, whatever its practical effect and consequence, it was "not sufficient as an excuse for the non-performance of the contract" with the plaintiff.

From the fact that the prevailing opinion below does not mention that decision, it is to be inferred that the author of that opinion deemed the decision outmoded. Yet, what has happened since 1904 to impair the substance of that decision? The expansion of governmental controls and the consequent multiplication of occasions for directives or refusals by governmental officials? That, it seems to petitioner, sharpens, rather than dulls, the necessity of distinguishing authoritative and truly mandatory acts of state from those which are merely advisory or precatory or unauthorized. Surely, the same legal consequences do not attach to utterances in the latter category as to acts which truly are binding on parties. It cannot be that our battling authoritarianism abroad has boomeranged to destroy for us here the significance of our boast that ours is a "government of law and not men".

The prevailing opinion below is significant also for its omission of any reference to *Swayne & Hoyt* v. *Everett*, 255

F. 71 (C. C. A. 9th C. 1919), where, again, "governmental coercion", although not so labelled, was held no excuse for non-performance of a contract. In that case, a California corporation operating a vessel between Shanghai and United States ports, whose British Shanghai agent refused to accept a shipment from Everett, a citizen of the United States, because of orders against him by the British Government for his dealings with Germany which at the time was at war with England, was held liable to Everett. The orders of the British Government to the carrier's agent, a British subject, were held no defense because the British Government had no governmental jurisdiction over the American carrier.

## IV.

**No "new circumstances" require or justify the disregard or reversal of the well-settled principles of law in the field of contract jurisprudence which are involved here.**

To what already has been said above, petitioner deems it necessary to add only that this case presented no new problem nor a new phase of an old problem.

The number and variety of the cases mentioned in the prevailing opinion and which are digested above—but a fraction of the reported cases in point—make clear the absence of novelty.

The novelty here is only the opinion of which review is sought—an opinion which, it is earnestly and sincerely submitted, departs from established law as fully as it ignores the facts proved by the evidence and postulates as facts conclusions not drawn from, and contrary to, the record in the case.

## V.

**The factual hypothesis of the prevailing opinion—that the defendant was "coerced" by the government of the United States which exercised and exerted an "overriding power"—are without the slightest basis in the record and directly contrary to the testimony of the defendant's witnesses.**

The Court is respectfully referred to the testimony reproduced in the Appendix (at pp. 48-54, *infra*).

## CONCLUSION

**It is respectfully submitted that the petition herein should be granted and writ of certiorari should issue.**

Respectfully submitted,

COPAL MINTZ,
Attorney for Petitioner.

February 1, 1950.

## APPENDIX

### Testimony of Defendant's Witnesses George Otto Mejlaender and Per A. Lorentzen

[At R. 68-69]:

"GEORGE OTTO MEJLAENDER, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Murphy:

Q. Mr. Mejlaender, what is your business? A. Ship brokers.

Q. In 1941 were you connected with the Norwegian Shipping & Trade Mission? A. Yes, sir.

Q. In what capacity? A. As representative in Washington of the Norwegian Shipping & Trade Mission.

• • • •

Q. For how long were you connected with the Nortraship? A. From June 1941 until November 1, 1946.

• • • •

Q. Did your duties then take you into contact with the United States Maritime Commission? A. Yes, sir.

• • • •

Q. About how often during a week would you say you were in consultation with various persons connected with the U. S. Maritime Commission? A. Every hour of the day.

• • • •

Q. Will you give us all the details, as best you recall, of the business that you did on behalf of Nortraship with the United States Maritime Commission from June 1941 until the end of 1941? A. Why, *it consisted largely in consulting with the Maritime Commission as to the utilization of ships,* that is to say, where they were to go and what they were to load.

The Court: Did you follow their instructions in reference to where the ships were to go and what they were to carry?

The Witness: Yes, sir.

• • • •

[At R. 74-77]:

Q. Your main job was to offer the services of the Norwegian merchant marine to the United States? Is that the sum and substance of what you did? A. *My job was to determine together with the United States* where the ships were going to be used and to the best effort, and where they could do their maximum service in the war.

Q. Does the answer to my last question also extend over to January 2, 1942, with respect to following the orders of the Maritime Commission. A. I don't quite understand the question, Mr. Murphy.

Q. The last question I asked you, about Nortraship obeying orders of the Maritime Commission from June to the end of December, 1941, did that also extend over to January 2, 1942? A. Yes, sir.

• • • •

The Witness: I think I can say that the cooperation between Nortraship and the United States after Pearl Harbor was, of course, still more close than at any other time prior to December 7th.

Cross-examination by Mr. Mintz:

Q. Mr. Mejlaender, *was it a policy of cooperation or of taking orders which your Government was following?* A. The Norwegian Government had exactly the same interests as the United States Government,

that is to say, to win this war. *It was a question that was never raised.* We were just as interested in our ships being utilized to the fullest extent in the war effort as the United States was because we had more at stake than anybody else.

Q. Were there occasions when there were differences of opinion between the officials with whom you were dealing in behalf of the United States Government and your own Mission? A. Yes, sir.

Q. As to what would be the best thing to do under certain circumstances? A. Yes, sir.

Q. *What happened in cases where there were those differences of opinion?* A. *They were always compromised. It was a question of give and take and they were compromised.*

Q. So it was not a situation where your Government was taking orders from the United States Government? A. *I don't think you can say that it was a case where the Norwegian Government took orders.* We are a democracy both in this country and in Norway. *It wasn't a question of taking orders. It was a question of compromising any differences and arriving at a solution that was to the best purposes of the war effort.*

Q. Of course, during that period you maintained the position that the Norwegian Government was a sovereign power? A. I do, sir.

Q. On a par with the United States as a sovereign power? A. I do, sir.

(Witness excused.)

"PER A. LORENTZEN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Murphy:

* * * *

Q. In 1941 were you connected with the Nortraship? A. Yes, sir.

Q. In what capacity? A. I was manager of the chartering department.

* * * *

[At R. 109-112]:

Q. Mr. Lorentzen, prior to the execution of that undertaking on October 4, 1941, did the Norwegian Shipping & Trade Mission accept directions from the Maritime Commission as to what routes your Norwegian ships would follow and what cargo they would carry? A. I will say we followed the *requests.*

Q. And you heard Mr. Mejlaender testify this morning, did you? A. Yes.

Q. Do you subscribe, from what you know of your dealings personally with the Maritime Commission, to what he testified this morning? A. Yes, sir.

Q. By the way, in your dealings with the Maritime Commission were there times when you differed with them with respect to what cargo a ship ought to carry and what type of cargo was best fitted for that ship? A. Yes.

Q. When you differed with them, you then discussed it with them and explained what your knowledge of the ship was and what was best for the safety of the ship for it to carry? A. Yes.

The Court: And did you follow their orders?

*The Witness*: Well, your Honor, I am—*I don't think it ever came to a question of ordering.* It was a question of cooperation.

The Court: At all times you complied with their—
*The Witness: Requests.*
The Court: Requests.

Cross Examination by Mr. Mintz:

Q. You regarded them as requests and not as orders, is that not so? A. Well, as I repeat, I don't think it came to becoming an order, because it was never necessary to give an order.

Q. *In other words, you from time to time had discussions and came to agreements and then you complied with whatever you agreed to comply with, is that correct?* A. *That is right.*

Q. *You did have the right to refuse to comply?* A. *If there was—if we thought we had reason to do so.*

Q. In other words, you did not surrender the sovereign rights of the Norwegian Government with respect to these vessels, is that so?

The Court: Do you understand that question?
The Witness: Yes, I understand.

Q. What is the answer? A. I think I understand it. My answer is, yes, *we did not submit.*

*The Court: You what?*
*The Witness: We did not submit.*
The Court: Have you any objection to that question?
Mr. Murphy: He is talking about before the execution of this undertaking, your Honor, I take it. I have no objection, if it is before October 4th.
The Court: There is no limitation put on the question, as I heard it.
Mr. Murphy: Then I do object to anything after October 4th, your Honor.

The Court: That objection is sustained.

Mr. Mintz: I respectfully except.

Q. In October—

The Court: The answer is stricken out, if there was an answer.

Q. Let me put it this way: Were you dealing with the United States Maritime Commission as a representative of another sovereign power? A. Yes, sir.

The Court: At what time? I think you should indicate it.

Q. Was that so in October, November and December of 1941? A. Yes.

Q. And in January 1942? A. Yes."

* * * *

[At R. 120-121]:

"Q. And between October 1941 and January 1942, if you decided you want to take the Tropic Star and send her elsewhere than the United States, you were at liberty so to do, weren't you? A. That I couldn't answer.

Q. Well, who was in control of the vessel? A. The Norwegian Shipping & Trade Mission.

Q. Who employed the captain? A. The Norwegian Shipping & Trade Mission.

Q. Who employed the crew? A. The Norwegian Shipping & Trade Mission.

Q. Under whose orders did the captain operate? A. Under the orders of Norwegian Shipping & Trade Mission.

Q. Had he received any orders from you to proceed elsewhere than to the United States— A. No, sir.

Q. No, I say, had he received orders, he would have been bound to obey your orders, would he not? A. Yes.

* * * *

Q. The captain? The captain was acting under orders of the Norwegian Shipping & Trade Mission? A. To proceed when he could.

Q. If he had received orders from you not to proceed, he would have been bound to obey your orders, isn't that so? A. Yes.

Q. You expect him to take your orders, do you not? A. Yes."

* * * *

[At R. 123]:

"Q. You say any request would have been followed. Suppose you regarded a certain request as being unreasonable? A. I would discuss it.

Q. So it wasn't a case of taking orders? A. *As I said before, it never came to the question of taking orders to my knowledge.*"

No witness testified in contradiction of the above.

MAR 2 1950
CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States

OCTOBER TERM—1949

No. 576

L. N. JACKSON & CO., INC.,

Petitioner,

*against*

THE ROYAL NORWEGIAN GOVERNMENT,

Respondent.

## PETITIONER'S REPLY MEMORANDUM

Petitioner begs leave to respectfully submit the following several brief observations in reply to the respondent's brief.

(1) In its argument as to the effect and scope of respondent's "undertaking" to the United States Maritime Commission, and the consequences of failure to heed a request or directive thereunder, respondent's brief overlooks not only (a) the testimony of respondent's own representatives (quoted in Petitioner's Br., Appendix, pp. 48-54) and (b) the sovereignty of the respondent, but also that (c) the "undertaking", by its terms, was limited to the scheduled vessels, (d) the applicability of the "undertaking" to any vessel was terminable by the surrender of the warrant therefor, and (e) the agreement (R. 263) "to give priority to the transportation of materials specified by the Commission, to the extent of the full cargo carrying capac-

ity of any vessel," was qualified by the following language immediately following that quoted in respondent's brief: "the terms and/or condition of such transportation to be fair and reasonable. The Commission will equitably apportion, insofar as is practicable, requests for such transportation between operators of suitable and available ships" (R. 263). Respondent's brief ignores those qualifications in the abbreviated quotations on pages 3, 16 and 18.

(2) At several points of its brief, respondent cites as established facts the wholly uncorroborated generalized utterances of a witness, which, if true, could have been properly documented. That applies to the footnote on page 4, the quotation from the Record on page 9, and the footnote on page 13.

(3) Respondent's discussion of, and quotation from, the opinion and decision of Mr. Justice Irving L. Levey of the New York State Supreme Court overlook the fact that that Justice was discussing the obligations of the defendant in that suit, the Seas Shipping Co., Inc., who was a resident national of the United States. Mr. Justice Levey was not called upon to consider, and offered no views on, the obligations and liabilities of the sovereign Royal Norwegian Government (who was not before him as a party or otherwise).

(4) Respondent's brief appears to be a complete rejection of the opinion on and by which the Court of Appeals reversed the judgment of the District Court. Surely, Judge Clark would not have written the lengthy opinion reported in 177 F. 2d 694, and Judge Swan would not have concurred in it, if they deemed this a case where the law intervened to enjoin performance and rendered it unlawful. And if that were the situation, Judge Learned Hand would not have written as he did.

(5) Respondent's argument of *res judicata* was rejected by the District Court and by Judge Learned Hand and cannot be claimed to have been sustained by Judges Clark and Swan. The suggestion that Mr. Justice Levey's determination in the New York court that respondent's *disclosed agent,* the Seas Shipping Co., Inc., was not liable to petitioner for breach of the contract of its principal The Royal Norwegian Government, is available to the latter as *res judicata* that it is not liable, is contrary to the basic principles of estoppel by judgment and is opposed by a host of cases of which several examples are: *U. S.* v. *California Bridge & Construction Co.,* 245 U. S. 337; *Bigelow* v. *Old Dominion Copper Co.,* 225 U. S. 111; *United Shoe Machinery* v. *U. S.,* 258 U. S. 451; *U. S.* v. *Pink,* 315 U. S. 203, 216-218; *Hansberry* v. *Lee,* 311 U. S. 32; *Anderson* v. *Abbott,* 321 U. S. 349, 354-5; *Drummond* v. *U. S.,* 324 U. S. 316, 317-318; *Land* v. *Dollar,* 330 U. S. 731, 736-7; *U. S.* v. *Kales,* 314 U. S. 186, 197-200; *U. S.* v. *Nunnally Investment Co.,* 316 U. S. 258; *Commissioner of Internal Revenue* v. *Sunnen,* 333 U. S. 591, 597-602; *Fish* v. *Vanderlip,* 218 N. Y. 229.

Respectfully submitted,

COPAL MINTZ,
Attorney for Petitioner.

February 28, 1950.

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# Supreme Court of the United States

**OCTOBER TERM, 1949**

**No. 576**

---

L. N. JACKSON & CO., INC.,

*Petitioner,*

against

THE ROYAL NORWEGIAN GOVERNMENT,

*Respondent.*

---

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### Proceedings Below

Petitioner, a New York corporation, seeks to review a decision dated November 10, 1949, of the United States Court of Appeals for the Second Circuit (R. 347) which reversed the decision of the District Court and directed that the action be dismissed (R. 361).

The suit was on the common law side of the United States District Court for the Southern District of New York, and was tried without a jury. The defendant named in the summons and complaint was Oivind Lorentzen, Director of Shipping on behalf of the Royal Norwegian Government and The Norwegian Shipping and Trade Mission (R. 2, 3). As the Royal Norwegian Government was the real party in interest, it appeared and defended.

The suit seeks to hold respondent liable in damages because, in December, 1941, at a time of the greatest national emergency, the respondent, without objection on the part

of petitioner, obeyed a lawful order of the United States Maritime Commission which required the substitution of critical strategic commodities, urgently needed for national defense, in place of a shipment previously booked.

The facts are settled by the findings below and by those of the New York State courts in a related case. The applicable legal principles are not at all novel; they are expressed in the Restatement of the Law of Contract, Section 458, and in the decisions of this Court in *The Kronprinzessin Cecilie,* 244 U. S. 12, and *Texas Company* v. *Hogarth Shipping Co., Ltd.,* 256 U. S. 619, as well as in other well-known authorities, *infra,* pp. 7-12.

The case is reported below in 83 F. Sup. 486 and 177 F. (2d) 694.

## The Facts

In view of the incomplete statement contained in the petition, it is necessary briefly to restate the facts.

The Royal Norwegian Government, at the relevant times a Government in exile, operated, controlled and managed the Norwegian steamship Tropic Star, as owner by requisition, through the agency of The Norwegian Shipping and Trade Mission, of which Mr. Oivind Lorentzen was the Director (R. 336, 255, 276).

Seas Shipping Co., Inc., an American company, was engaged as berth agent to book cargo for the Tropic Star for carriage from Beira, East Africa, to the United States (R. 336) at the instance of the Maritime Commission (R. 285, 160). On November 7, 1941, Seas Shipping Co., Inc., "booked" 1,000 tons of copra for the steamship Tropic Star for carriage from Beira to New York (R. 337) by letter addressed to petitioner's agent W. J. Byrnes & Company reading (R. 239, 240, 63):

> "We have for acknowledgment your letter November 6th and are pleased to confirm that we have booked 1,000 tons COPRA, in bags, for the SS 'Tropic Star', expected to be ready to load at Beira on November

25th, destination New York, rate $22.00 per 2240#, brokerage 1¼%.

We are cabling to our agents at Beira, asking them to arrange with the Manica Trading Company for delivery of the COPRA to the steamer.

It is understood that the freight is collect and will be paid by your principals, Messrs. L. N. Jackson & Co., Inc., upon cable advice that the cargo has been loaded."

More than one month previous to this "booking", on October 4, 1941, the respondent had filed an application with the United States Maritime Commission, under the Ship Warrants Act (Vol. 55 Stats. at L. 591, approved July 14, 1941), for warrants for all of its ships which would or might come to United States ports (R. 349, 203).

One of the conditions in the application was "to give priority to the transportation of material specified by the Commission to the extent of the full cargo carrying capacity of any vessel * * * " (R. 263).

Disobedience to any order issued under the Act entails a fine of up to $5,000 or two years' imprisonment or both (Sec. 6, *infra*, p. 19).

At the time of the "booking", the Tropic Star was undergoing repairs at Durban and, due to war conditions, the repairs took longer than had been anticipated (R. 277). The plaintiff was notified of the delays and continued to extend the time for loading at Beira (R. 277). The United States Maritime Commission had been notified of the above booking, a copy of the letter of November 7th being sent to it, and had approved it (R. 205).

On December 22, 1941, Mr. A. E. King, Assistant Director of the Division of Emergency Shipping of the United States Maritime Commission, notified Mr. S. J. Maddock, vice-president of Seas Shipping Co., Inc., by telephone that the 1,000 tons of copra, booked for the Tropic Star, would have to be cancelled and wool substituted (R. 165). Maddock objected vigorously, telling King that "he ought to let the copra move on the ship if he possibly could" (R. 165). Mr. King said: "Notwith-

standing that, the OPM have said you have to move the wool * in every bottom that is moving, and you will have to cancel the copra * * * *" (R. 168); and on the same day telegraphed Seas Shipping Company (R. 278):

> "Tropic Star due to requirements for critical strategic commodities please cancel booking 1000 tons copra substitute sisal wool. Confirm.
>
> A. E. KING
> U. S. Maritime Commission."

Immediately on receipt of this telegram, Seas Shipping Co., Inc., notified petitioner's brokers, by telephone, and wrote them a letter reading (R. 297, 225):

> "We have been instructed by the Maritime Commission to cancel this booking of 1000 tons of copra * * * and would thank you to advise your principal accordingly."

Petitioner made no complaint or protest to respondent or Seas Shipping Co., but by direct application to Mr. King sought, without success, to have this order rescinded (R. 222, 223).

On December 31, 1941, Seas Shipping Co., Inc., telegraphed Mr. King for further instructions, transmitting a complaint of the suppliers at Beira (not the petitioner) that they had incurred heavy expense in bringing the copra to the loading port (R. 278).

On January 2, 1942, Mr. King replied (R. 279):

> "Ytd. Tropic Star Copra. Can only reiterate urgent defense requirements make necessary carriage of essential commodities accordance our previous instructions."

Because of this order of the Maritime Commission, respondent was unable to carry the copra.

---

* The U. S. Government had purchased a big block of wool in East Africa which had to be promptly moved (R. 189).

**The prior decision in the New York State Courts which held that the order of the United States Maritime Commission discharged any obligation assumed under the booking**

In view of its understanding that its contract was with Seas Shipping Co., Inc., petitioner first sued Seas Shipping Co., Inc., as the contracting party in the New York Supreme Court. The summons and complaint, in which it is alleged that Seas Shipping Co., Inc., agreed to carry the copra, is at R. pp. 304-308, 229.

The case was tried by Mr. Justice Irving L. Levey, sitting without a jury, in March, 1945, and his opinion dismissing the suit, reported in *L. N. Jackson & Co. Inc.* v. *Seas Shipping Co., Inc.*, 185 Misc. (N. Y.) 94, 56 N. Y. S. (2d) 501. The important parts of his opinion are (185 Misc. p. 95):

> "In this action the plaintiff seeks to recover, as damages, certain profits representing the difference between the contract and market prices of 1,000 tons of copra which, as plaintiff alleges, the defendant had failed to load, contrary to agreement, on the S.S. *Tropic Star*, at the port of Beira, East Africa, on November 25, 1941, and transport to New York.
>
> The Norwegian Shipping and Trade Mission had authorized the defendant, as a berth agent, in or about the early part of October, 1941, to book freight for the afore-mentioned S.S. *Tropic Star*, scheduled to sail from the said port of Beira during November, 1941, but advised the defendant at the same time that the vessel was then laid up in Durban, distant about eight hundred miles, awaiting repair parts from England.
>
> The defendant, anticipating probable delay, booked the cargo for the plaintiff through the latter's broker, with the express provision that the ship was 'expected to be ready to load at Beira on November 25th, destination New York.'"

After reference to the delay in loading, Mr. Justice Levey's opinion continues (185 Misc. p. 95):

> "Then occurred the fateful Pearl Harbor incident and every available facility was employed and requisitioned by government agencies to expedite delivery of those strategic materials deemed necessary for our defense and war effort. In this connection, the United States Maritime Commission on December 22, 1941, confirmed subsequently on January 2, 1942, ordered the immediate cancellation of the carriage of copra in the following telegrams: * * *."

The opinion then quotes the two telegrams of the Maritime Commission of December 22, 1941, and January 2, 1942, requiring cancellation of the booking (*supra*, p. 4).

The opinion continues (185 Misc. p. 96):

> "I further find that the defendant was justified in complying with the order of the United States Maritime Commission, the latter acting in conformity with the provisions of the United States Ship Warrants Act (U. S. Code, tit. 50, Appendix, § 1281 et seq.). Refusal to obey the cancellation order would have subjected the owner not only to severe penalties but also would have cast a sinister reflection on the attitude of the defendant and the owner toward our war effort.
>
> This direct intervention by a government mandate in one of the most perilous periods of our nation's history embodied every element significant and essential for a complete frustration so as to excuse, without question, performance on the part of the defendant. (*Matter of Kramer & Uchitelle, Inc.*, 288 N. Y. 467; *Mawhinney* v. *Millbrook Woolen Mills*, 231 N. Y. 290; *Nitro P. Co.* v. *Agency of C. C. and F. Co.*, 233 N. Y. 294; *Matter of Gunze Silk Corp.* [Rudolph Corp.], 266 App. Div. 541; *Matter of Kahn & Feldman, Inc.* [Rothchild], 265 App. Div. 470, affd. 290 N. Y. 781.)"

The findings of fact and conclusions of law of Mr. Justice Levey are at R. 299-304.

Petitioner appealed to the Appellate Division, which affirmed without opinion (270 App. Div. 830), as did also the Court of Appeals (296 N. Y. 529).

As the State courts had held petitioner's claim unmeritorious, it commenced this new action in the United States District Court.

## FIRST POINT

**The order of the United States Maritime Commission cancelling plaintiff's booking of 1,000 tons of copra and directing the respondent to substitute other shipments excused performance.**

The rule is stated in the Restatement of the Law of Contracts (American Law Institute), Section 458, (p. 852):

> "§ 458. *Supervening Prohibition or Prevention by law.*
>
> A contractual duty or a duty to make compensation is discharged, in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty, where performance is subsequently prevented or prohibited
>
> (a) by the Constitution or a statute of the United States, or of any one of the United States whose law determines the validity and effect of the contract, or by a municipal regulation enacted with constitutional or statutory authority of such a State, or
>
> (b) by a judicial, executive or administrative order made with due authority by a judge or other officer of the United States, or of any one of the United States."

To the same effect, Williston on Contracts, Rev. Ed., Secs. 1938, 1939.

In the present instance, performance was prohibited by an administrative order of the United States Maritime

Commission, with the result that the case at bar comes squarely within the above well-settled rule. The circumstances do not show any "contrary intention" nor was there any "contributing fault". These are the only two exceptions recognized.

In the District Court, the defendant was held liable on the ground that the principle of frustration

> "does not apply where the intervening event is reasonably foreseeable and could and should have been controlled by provisions of such contract" (R. 332, further discussed *infra*, pp. 9-12).

The above statement is contrary to the well-settled rule of law as established by such well-known and authoritative decisions as *The Kronprinzessin Cecilie*, 244 U. S. 12; *Texas Co.* v. *Hogarth Shipping Co., Ltd.*, 256 U. S. 619; *In re Shipton Anderson & Co.*, 1915, 3 K. B. 676; *Matter of Kramer & Uchitelle*, 288 N. Y. 467; and *W. J. Tatem, Ltd.* v. *Gamboa*, 1939, 1 K. B. 132, see *infra*, pp. 9-12. Furthermore, in the case at bar, the "intervening event" was *not* reasonably foreseeable; this the District Court overlooked.

The booking in this case was made on November 7, 1941, and the ship was expected to be ready to load at Beira on November 25th, about 2 weeks later. It has been stipulated that——

> "On November 7, 1941, when the booking to carry the copra was entered into, it was reasonably to be expected that the ship would be ready to load at Beira on November 25, 1941" (R. 277).

The previously given permission to carry plaintiff's copra was revoked because of the combination of the following unexpected events:

1. Unanticipated delay in completing the ship's repairs;

2. The unanticipated attack on Pearl Harbor on December 7, 1941, during that delay, and the entry of the United States into the war;

3. During the unforeseeable continuance of that delay, the Office of Production Management

> "undertook a review of all ship assignments of homebound materials coming to this country to * * * confine the use of all shipping coming toward the United States to the highest priority materials.
>
> That is the background of sending this telegram [of December 22, 1941] to eliminate copra and substitute sisal and wool * * * *" (R. 200).

If the ship had not been delayed and if the United States had not become involved in the war, and if the Government had not decided to give priority to sisal and wool, the Maritime Commission would not have ordered the cancellation of the previously approved booking. The combination of these unusual events was unforeseeable when the booking was made.

In *The Kronprinzessin Cecilie,* supra, the ship had, on July 27, 1914, issued bills of lading for shipments of gold to be delivered at Plymouth and Cherbourg, and sailed from New York on July 28th.

At the dates mentioned, the possibility, and even probability, of a European war was clearly foreseeable by reason of public events recited in the opinion of the lower court.

On July 23rd, Austria had sent an ultimatum to Servia. On July 24th, Russia stated that, if Austria made war on Servia, Russia would intervene, and France gave notice that she would side with Russia.

The situation continued to deteriorate by severance of diplomatic relations, mobilizations and proclamations of martial law until on July 28th, war was formally declared between Austria and Serbia. A few days later all the great powers were involved.

It was held that the change in circumstances due to war conditions, although clearly foreseeable when the cargo was received, justified the ship in putting back to the

United States and in failing to make delivery of it at destination. Mr. Justice Holmes said for this Court (p. 22):

> "With regard to the principles upon which the obligations of the vessel are to be determined it is plain that, although there was a bill of lading in which the only exception to the agreement relied upon as relevant was 'arrest and restraint of princes, rulers or people,' other exceptions necessarily are to be implied, at least unless the phrase 'restraint of princes' be stretched beyond its literal intent. The seeming absolute confinement to the words of an express contract indicated by the older cases like *Paradine* v. *Jane*, Aleyn, 26, has been mitigated so far as to exclude from the risks of contracts for conduct (other than the transfer of fungibles like money), some, at least, which, if they had been dealt with, it cannot be believed that the contractee would have demanded or the contractor would have assumed. *Baily* v. *De Crespigny*, L. R. 4 Q.B. 180, 185. Familiar examples are contracts for personal service, excused by death, or contracts depending upon the existence of a particular thing. *Taylor* v. *Caldwell*, 3 Best & Smith 826, 839. It has been held that a laborer was excused by the prevalence of cholera in the place where he had undertaken to work. *Lakeman* v. *Pollard*, 43 Maine, 463. The same principles apply to contracts of shipment."

In *Texas Co.* v. *Hogarth Shipping Co., Ltd.*, supra, a British steamship company had, in February, 1915, chartered its steamer to the Texas Company to carry a cargo from Port Arthur to South Africa.

On April 10, 1915, the British Admiralty, pursuant to a Royal Proclamation of the preceding August, telegraphed the owner: "The Baron Ogilvy is requisitioned under royal proclamation for government service." The contract was, therefore, not performed.

The Texas Company's suit for damages was dismissed on the ground that obedience to a lawful governmental order excused performance.

In *Texas Co.* v. *Hogarth*, supra, the charter party was entered into after England had been at war for many

months, and requisitions under the Royal Proclamation of August 3, 1914, were common. However, as stated by this Court, "there was no provision [in the charter party] casting the risk on either party" (p. 631).

This Court said (pp. 629, 631):

> "It long has been settled in the English courts and in those of this country, federal and state, that where parties enter into a contract on the assumption that some particular thing essential to its performance will continue to exist and be available for the purpose and neither agrees to be responsible for its continued existence and availability, the contract must be regarded as subject to an implied condition that, if before the time for performance and without the default of either party the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it."
>
> • • • • • • •
>
> "Both [owner and charterer] assumed that the ship would remain available and that was the basis of their mutual engagements. These, we think, must be regarded as entered into on an implied condition that, if before the time for the voyage the ship was rendered unavailable by such a supervening act as the requisition, the contract should be at an end and the parties absolved from liability under it."

In *In re Shipton, Anderson & Co.*, 1915, 3 K. B. 676, cited with approval in *Texas Co.* v. *Hogarth, supra,* at page 630, Shipton, Anderson & Co. had, by a contract of September 2, 1914, agreed to sell a quantity of wheat lying in a warehouse in Liverpool.

On September 8th, prior to delivery, the sellers received a written requisition under a British statute which had come into force on August 7th, requiring them to deliver the wheat to the British Government. The possibility of governmental intervention was foreseeable and could have

been, but was not, guarded against in the contract. Darling, J., said (p. 684):

> "We are in a state of war; that is notorious. The subject-matter of this contract has been seized by the State acting for the general good. *Salus populi suprema lex* is a good maxim, and the enforcement of that essential law gives no right of action to whomsoever may be injured by it."

In *W. J. Tatem, Limited* v. *Gamboa,* 1939, 1 K. B. 132, the headnote reads:

> "If the foundation of a contract goes either by the destruction of the subject-matter or by reason of such long interruption or delay that the performance is really in effect that of a different contract, and the parties have not provided what in that event is to happen, the performance of the contract is to be regarded as frustrated, *even though the event which causes the destruction of the subject-matter or the interruption or delay was within the contemplation of the parties when they made the contract.*" (Italics ours.)

To the same effect;

> Williston on Contracts, Rev. ed., § 1953.
> *Matter of Kramer & Uchitelle,* 288 N. Y. 467.

The cases cited in the District Court's opinion do not support its conclusion.

*Berline* v. *Waldschmidt,* 159 Kansas 585, 156 P. (2d) 865 (R. 997), was a suit to extend the term of a mineral deed, otherwise due to expire, for the period during which a test well could not lawfully be drilled on the property because of war-time regulations. There was no provision in the deed authorizing an extension under such circumstances and hence no extension was granted. In that case, the plaintiff was asking that the time for performance of the contract be extended in its favor because of the war-time restriction. It was not a case like the present, where

the defendant is sought to be cast in damages because its performance was prevented by governmental order.

*State Mutual Life Insurance Co.* v. *Gruber,* 269 App. Div. (N. Y.) 170 (R. 996), is typical of the other authorities cited in the District Court opinion. In that case, the defendant had leased plaintiff's factory in order to manufacture so-called "sextants" for the Government. Shortly after the lease had been executed, the Government cancelled the manufacturing contract. It was held that this did not release the defendant from liability under the lease, because the lease did not become illegal and the defendant could have used the leased property for other purposes. The Court said (p. 173):

> "The present case is readily distinguishable from instances where the performance of the contract between the parties has been rendered illegal by act of law. (*Matter of Kramer & Uchitelle, Inc.,* 288 N. Y. 467.) No law has rendered illegal the performance of the lease and the payment of rent, nor has any governmental order, statute or proclamation abrogated that contract."

Some additional authorities on this branch of the case are cited by the Court of Appeals, particularly at R. 352, 355, 358, 359.

The District Court implied that the loss was suffered by reason of a contract voluntarily entered into and that, however praiseworthy the motives, the defendant must pay the penalty.

The effect of the Warrant Act was to create a condition of status, and this status applied to all vessels which traded to the United States, except Spanish and Portuguese (R. 353).* All American, all British, all Norwegian, all Canadian and all Panamanian vessels, among others, had warrants. Petitioner alleged under oath in its State court complaint (R. 305, 306, 229), that the contract was made with the Seas Shipping Company, an American company,

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*No Argentine vessels came to U. S. ports; hence they did not take out warrants (R. 142).

as principal, and it must therefore have realized that the carriage was subject to the Warrant Act. It was a condition known throughout the shipping world. That practically all ships were subject to the Act was demonstrated by the fact that the plaintiff could not get substitute space for its copra, and apparently ceased all efforts when notified by Mr. King of the Maritime Commission that there was no hope for any space (R. 223).

Nor was an application for warrants voluntary in any true sense of the word. Warrant-holding vessels were entitled to the preference, which meant that the turn of unpreferred vessels would come only after such interminable delays as would make the transportation and delivery of cargo impossible (R. 141, 201, 354).

Some other arguments made by the petitioner will be briefly discussed.

(1) Petitioner claims that it was not charged with knowledge that the respondent was subject to the order of the Maritime Commission.

This contention we consider immaterial but, in any event, petitioner is clearly charged with knowledge of the situation.

As already pointed out, *supra*, pages 5, 13, petitioner believed that it was contracting with Seas Shipping Company, Inc., a New York corporation (R. 305), which would unquestionably be subject to the Warrants Act so that petitioner is in no position to claim surprise.

The "booking" on which petitioner's suit is founded shows on its face that a copy was sent to Mr. A. E. King, Assistant Director, Emergency Shipping, of the Maritime Commission, a clear notice that it was subject to Maritime Commission control (Ex. 1, R. 240, 63).

With reference to the contention that petitioner had no knowledge of the then effective governmental control through Ship Warrants, the Court of Appeals said (R. 356, 357):

> "This passes belief. It is to be noted that plaintiff presented no evidence on this point at all, its entire

case being limited to the documents showing the agreement and its cancellation. These disclose that each of the parties acted through an American shipping agent. That the agent acting for plaintiff had so little knowledge of his business that he did not know the then most important development in it, that, indeed, he had no suspicion even when the crucial letter showed on its face that it was going forward to the governmental agent in actual control of American shipping, is not easy to accept. Were such to be the fact, it would mean that he knew no more than to ship by a vessel for which there was no assurance of its ever docking and unloading in contrast to the more favored carriers who either were of necessity under the system or had accepted it. At most this seems to us clearly a case within the authorities that plaintiff should have known of the existence and operation of the system substantially as fully as the defendant, that defendant could reasonably have so concluded, and hence that there was no arbitrary obligation on the defendant to protect itself by express stipulation against the operation of the system. This is borne out by the nature of the contract itself, which is in form a reservation of space for the goods in this vessel for the voyage. Obviously it does not assume to set forth the detailed obligations of the parties. No obligation at all is stated for the shipper, except to pay the freight upon the cabled advice that the cargo has been loaded. On the carrier's side, it may be noted that no attempt is made to state even the standard condition, referred to above, that the vessel shall not have been destroyed before the start of the voyage."

Petitioner, an international trader on a large scale, cannot seriously claim to be ignorant of what was known to everyone else.

As stated in *The Tompkins*, 13 F. (2d) 552, 554, C. C. A. 2:

> "Knowledge of facts, which to the mind of a man of ordinary prudence, beget inquiry, is actual notice, or, in other words, is the knowledge which a reasonable investigation would have revealed." (Quoted from *Fidelity & Deposit Co.* v. *Queens City Trust Co.*, 226 N. Y. 225, 233.)

(2) The authority of Mr. A. E. King to require cancellation of the booking is established by his official appointment, Exhibit I (R. 282), and by the testimony of Mr. H. Robson, Mr. King's superior, that Mr. King had authority to sign the telegrams requiring cancellation (R. 140, 145, 146).

(3) The Tropic Star was clearly subject to the Ship Warrants Act, although no vessels were specifically named in the application.

The Ship Warrants Act (55 Statutes at Large 591, 50 U. S. C. A. App. Sec. 1281), Section 1, provided that warrants might be issued to foreign flag vessels on application and that "such application shall be in such form as the United States Maritime Commission may prescribe".

The respondent herein made application to the Maritime Commission for warrants in the prescribed form and that application was accepted and filed (Exhibit B, R. 259, 271, admitted without objection R. 85). By signing, respondent agreed that it would "truly and faithfully observe and carry out these uniform conditions" among which was the obligation "to give priority to the transportation of materials specified by the Commission" (R. 263).

By reason of established practice, the Maritime Commission and the respondent considered the Tropic Star and all other like vessels subject to the Warrants Act. This was found below (R. 337, 353), and also in the New York State Court litigation (R. 302).

(4) Petitioner's argument, that the respondent profited because of the cancellation is trivial. Whether or not the cancellation resulted in a profit to the petitioner was not a proper subject of litigation, nor was it in fact litigated. A governmental order may result in a profit to the party whose performance is prevented, as in *The Claveresk*, 264 Fed. 276, but it makes no difference whether it results in profit or loss.

(5) Petitioner also suggests that the respondent should have contested the order of the Maritime Commission and

refused to obey it. The petitioner *did not request the respondent to take any such action,* nor did the petitioner on its own behalf take any steps, except to obtain confirmation from Mr. King that no ship would be available (R. 223). At a time of the greatest national emergency, like that immediately succeeding Pearl Harbor, there could be no obligation on the respondent officiously to contest or disobey lawful government orders.

(6) Petitioner particularly relies on *Baker Castor Oil Co.* v. *Insurance Co. of No. America,* 157 F. (2d) 3, C. C. A. 2; *Northern Pac. Ry. Co.* v. *American Trading Co.,* 195 U. S. 439; *Swayne & Hoyt* v. *Everett,* 255 Fed. 72.

The *Baker Castor Oil* case, distinguished by the Court of Appeals (R. 358), was a suit on a policy of insurance. In *The Kronprinzessin Cecilie, supra,* pp. 8, 9, this Court pointed out (244 U. S. p. 23) that insurance cases "throw little light upon the standard of conduct to be applied" where the shipowner is sued for non-performance.

In the *Northern Pacific Railway* case, where a vessel's sailing was delayed by the mistaken act of a Deputy Collector of Customs, this Court said, 195 U. S. at 467:

> "There was no intervention of the Government of the United States."

At page 468:

> "It was not an act of the state—but a mistaken act of a subordinate official not justified by law * * *."

*Swayne & Hoyt* v. *Everett* involved a tender of a shipment at Shanghai to an American Steamship Company by an American citizen for carriage to the United States. At the time of the tender, which was made prior to the entry of the United States into the first World War, the steamship company's Shanghai agent was a British subject who refused to accept the shipment on the ground that the consignee in the United States was on the British blacklist. Neither this nor any of the other cases cited have any proper bearing on the decision in the case at bar.

(7) For no easily discernible reason, petitioner quotes at great length from the testimony of two of the witnesses at pages 48-54 of its brief. The contention seems to be that Norway and the United States were on an equality from which premise nothing of importance follows.

In the present instance, the respondent had signed the ship warrant application which reads (R. 262):

> "The applicant agrees to the uniform conditions approved by the Commission and dated August 25, 1941, and will truly and faithfully observe and carry out these uniform conditions."

One of these "conditions" was "to give priority to the transportation of materials specified by the Commission" (*supra*, p. 3).

As regards the matters here pertinent, therefore, respondent had agreed to obey the orders of the Commission.

The Restatement of the Law of Contracts, Section 454, page 843, reads:

> "In the Restatement of this subject impossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved."

For the respondent to have defied the order of the Maritime Commission would have resulted in extreme and unreasonable injury to the respondent in view of its close relations with our Government and its obligation as one of the original members of the United Nations; defiance would have "cast a sinister reflection" upon respondent's attitude "toward our war effort" (Levey, J., *supra*, p. 6).

Irrespective of the Warrants Act, obedience to the order of the United States Maritime Commission, given in the most perilous period of our nation's history, furnishes an excuse.

(8) Petitioner makes the unfounded statement that the Court of Appeals decided the case on a novel theory, not previously formulated.

On the contrary, the basic ground of the Court of Appeals' decision is the same as that relied on in the prior litigation in the New York State Courts, *supra*, pages 5, 6.

*The dissenting opinion of Judge Learned Hand.* Judge Hand did not vote to affirm the decision of the District Court, nor differ from the rules of law stated in the opinion of Judge Clark, concurred in by Judge Swan. His view, that a new trial should be ordered, was based on his failure to give full consideration to the proved facts.

His conclusion was (R. 362):

> "Therefore, I think that the defendant had the burden of proving (1) either that the Commission would have coerced or at least would have requested the defendant to repudiate its contract; or (2) that the plaintiff would have engaged the space in the 'Tropic Seas' (sic), even if it had known that the defendant had already consented to take out warrants for its ships."

(1) The Maritime Commission, speaking through Mr. King, in fact "requested the defendant to repudiate its contract". On December 22, 1941, the Maritime Commission telegraphed:

> "Cancel booking 1000 tons Copra substitute Sisal wool" (*supra*, p. 4).

On January 2, 1942, the Maritime Commission again telegraphed:

> "Can only reiterate urgent defense requirements make necessary carriage of essential commodities accordance our previous instructions" (*supra*, p. 4).

The matter was not one of negotiation. The respondent had, by signed agreement, become subject to the direction of the Maritime Commission. Under Section 6 of the Warrants Act, drastic penalties are provided for disobedience to any rule, regulation or order issued under the authority of the Act, as follows:

> "SEC. 6: Whoever wilfully violates any rule, regulation or order issued under the authority conferred

herein shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years or both."

In case of disobedience on the part of respondent's officials, it would have been the duty of the Department of Justice to obtain an indictment of the guilty persons.

(2) The evidence already in the case makes it clear that the petitioner would have engaged space on the Tropic Star whether or not it knew that the respondent had filed an application for Ship Warrants. Indeed, petitioner thought its contract was with an American company on whom the Warrants Act would be binding (*supra*, pp. 5, 13).

Petitioner alleged in its complaint that ships were in short supply and, in substance, that the Tropic Star was the only vessel available to lift the copra (R. 5). Shipping space was then available for only 40% of the OPM requirements (R. 139).

As no other ships were available, petitioner had everything to gain and nothing to lose by making the booking on the Tropic Star and the slight risk of prevention by governmental order was inconsequential. If the transaction went through, as seemed almost a certainty in November, 1941, a handsome profit would be realized. If, on the other hand, the Tropic Star was not permitted to load, petitioner could sustain no out-of-pocket loss.

## SECOND POINT

**There is no special or important reason for granting a writ of certiorari in the case at bar.**

A writ of certiorari will be granted "only where there are special and important reasons therefor" (Rule 38, Sec. 5). Subdivision B of Section 5 specifies the class of cases where a writ of certiorari will be granted to review a decision of the Court of Appeals, as where the decision is in

conflict with the decision of another Court of Appeals on the same matter, or where it is in conflict with applicable local decisions, etc.

There is no decision of any other Court of Appeals at variance with the decision now under discussion, nor is there any "conflict with applicable local decisions", because the decision of the Court of Appeals is squarely in accord with the decision of the New York Courts in *L. N. Jackson & Co.* v. *Seas Shipping Co., Inc.*, which was taken through all of the New York Courts, *supra*, page 7.

As pointed out, *supra*, page 2, and by the Court of Appeals (R. 357, 358), the case at bar involves nothing more than the application of well-settled principles to a state of facts similar to those in many adjudicated cases.

## THIRD POINT

### The defense of *res judicata*.

Respondent set up in its answer that the decision in the New York State Court afforded a complete defense to the later suit brought by petitioner in the United States District Court on the ground of *res judicata*.

The District Court held the defense of *res judicata* inapplicable, on the ground that the New York Court of Appeals *might have based its affirmance* on the agency point alone (R. 332). This overlooks the well-settled rule stated in Vol. 34, Corpus Juris, Article on Judgments, Sec. 1190, p. 773, as follows:

> "A general affirmance of a judgment on appeal makes it res judicata as to all the issues, claims, or controversies involved in the action *and passed upon by the court below*, although the appellate court does not consider or decide upon all of them, * * *." (Italics ours.)

The Court of Appeals expressed no opinion on this defense.

In tort the law is well-settled that, where suit is first brought against an agent, and the suit is dismissed because the plaintiff fails to prove a cause of action, that decision is *res judicata* of a later suit against the agent's principal to recover for the same damage. *Good Health Dairy Products Corp.* v. *Emery,* 275 N. Y. 14, 18. The same principle must apply in a contract case where it has been decided in the prior suit against the agent that no actionable breach of contract exists because performance was prohibited by valid governmental order.

## LAST POINT

**The petition for a writ of certiorari should be denied.**

Dated, New York, February 20, 1950.

Respectfully submitted,

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